THE EASTERN CARIBBEAN SUPREME COURT IN THE HIGH COURT OF JUSTICE

SAINT VINCENT AND THE GRENADINES

SVGHCV2011/0101

IN THE MATTER OF THE INTERNATIONAL BANKS ACT 1996

IN THE MATTER OF THE INTERNATIONAL BANKS ACT 2004

IN THE MATTER OF THE COMPANIES ACT 1994

BETWEEN

STANLEY DE FREITAS (TRADING AS DEFREITAS AND ASSOCIATES) OF BEACHMON,TKINGSTOWN

CLAIMANT

-AND-

TRANSGLOBAL BANK INC. (IN LIQUIDATION)

DEFENDANTS

AND

INTERNATIONAL FINANCIAL SERVICE AUTHORITY OF BAY STREET, KINGSTOWN

(now styled Financial Services Authority)

CONSOLIDATED WITH: SVGHCV2011/0102

BETWEEN

STANLEY DE FREITAS (TRADING AS DEFREITAS AND ASSOCIATES) OF BEACHMON,TKINGSTOWN

-AND-

HORIZON BANK INTERNATIONAL LIMITED (IN LIQUIDATION)

AND

INTERNATIONAL FINANCIAL SERVICE AUTHORITY OF BAY STREET, KINGSTOWN

(now styled Financial Services Authority)

DEFENDANTS

Appearances :

Mr. Joseph Delves of counsel for the Claimant

Mr. Parnell R. Campbell, Q.C. of counsel for the Defendant

2017: July 7

September 15

JUDGMENT

[1] **Cottle,** J:On November 11 2004 the defendants, the regulator of international banks in St. Vincent and the Grenadines, appointed the claimant as controller of a troubled international bank. The appointment was made pursuant to Section 18(2) (e) of the International Banks Act 1996.

[2] The legislation empowered the defendants to appoint, "at the expense of the licensee", a person to assume control of the licensee's affairs with all the powers, mutatis mutandis, of a person appointed as a receiver or appointed under the Companies Act.

[3] The claimant undertook the commission. He produced reports which he submitted to the defendants. On April 28 2005 he delivered to the defendants his account for payment for his

service. The balance outstanding was Twenty-six Thousand Four Hundred and Ninety Dollars and Twenty-five cents (US$26,490.25). The defendants did not reply. The claimant was not paid.

[4] The troubled international bank was placed into liquidation by the High Court on July 29 2005. The court directed the defendants to hand over to the liquidator "All the present and future assets and property of the Bank including without limitation the Bank's statuotry deposit held by the defendants...."

[5] In September 2005 the defendants handed over the statutory deposit to the liquidator. The claimant issued the present claim. He seeks payment of his professional fees. The defendants agree that the workman is worthy of his hire. However they say the statute and letter of appointment of the claimant are clear that his appointment was at the expense of the Bank. This court is now called upon to determine the meaning of the phrase "at the expense of the licensee" and the connected question as to who should pay the claimant for work he performed.

DISCUSSION

[6] It is accepted that the claimant performed the work that he was appointed to perform. The defendants take no issue about the quality of the work done. The letter of appointment explicitly stated that his appointment was "at the expense of the licensee". It made no specific provision for the payment of the claimant's costs, fees or disbursements by the bank.

[7] Counsel for the claimant submits that the expressions "at the expense of the licensee" connotes that the bank would be the source of funds out of which the claimant would be paid. This is supported by the fact that the defendants paid to the claimant, part of his fees in the form of a retainer, out of funds of the bank then held by the defendants. Counsel adds that the appointment letter does not say that the claiman twas acting as agent for the bank.

[8] He relies on the **Bank Crozier1** case and argues that a receiver, like the Claimant, who is not appointed by the court, is really an agent of the parties or one of them according to the terms of the appoint mentor the terms of the statute under which the appointment was made. Counsel derives additional support from the learned author of **The Law Relating to Receivers Managers and Administrators 4th Ed.** By Hubert Picarda at pp 304 -306

"Who Pays?

The rece iver ' s remuneration is usually payable by the companY3 . Some *debentures have an express provision that the company shall be liable for the receiver's remuneration. More frequently the debenture will provide that any receiver and manager appointed there under shall be the agent of the company and that the company shall be responsible for such receiver's acts and defaults and for his remuneration 4• Such a provision consttiutes the company the appointee's principal, and therefore his paymaster. In the absence of such an express provision it is a question of construction whether the receiver*

is the agent of the company or of the debenture holder who appointed him . If the receiver is the agent of the debenture holders then they are responsible for his remunerat ion .

It has long been the practice to incorporate in the document constituting the security provision analogous to those in the statutory provision under which the receiver is deemed to be agent of the mortgagor. The question of construction will then be how far the instru m n e t unde r consideration b y adopting , extendin g o r excludin g th e relevant statutory provision in fact constituted the receiver the agent of the company.

The ac tual decision in Deyes v. Wood s was that the debenture holder who appointed the receiver were liable for his remuneration on the footing that he was their agent . The debentures incorporated provisions of the Conveyancing Act 1881 relating to receivers but also conferred powers that went beyond those conferred by the Act. The debenture omitted to express the well-known provision that the receiver should be the agent of the company mortgagor . Incorporation of the statutory provision which included inter alia a

provision that a *receiver appointed under the statutory powers should be deemed to be the*

agent of the mortgagor does not necessarily incorporate the latter provision because the provision applies " unless the mortgage deed otherwise provides " the extended powers to

carry on the business and to realize the capital assets of the business were held to represent a *sufficient contrary provision so that the receiver and manager was the agent of, and could look for remuneration from, the debenture holders.*

Out of what fund?

The question who pays the receiver should be distinguished from the question : against or from what fund is the remuneration to be charged or paid, as the case may be? 6 In Deyes v Wood 7 for example the issue was not whether the receiver was entitled to deduct and retain his remuneration out of the fund realised , but rather whether the receiver was limited to looking to the fund or could look also to the debenture holders , he being the ir agent 8 .

The question which arose in Moodemere Pty Ltd v Waters 9 was not so much whether the receivers were entitled to l ook to the deben tu re holder for the remuneration and

reimbursement of costs , charges and expenses of realisationbut rather whether they were , as a *matter of la, entitled to deduct and retain out or the fund realized costs, charges, expenses and remuneration earned relating to the realization in priority to and even against the debenture holder, the liquidator and the creditors generally. The emphasis in the decided cases is that the costs of realising assets and creating* a *fund from which to*

satisfy a *secured debt are payable out of the fund do created before the debt itself is*

satisfied 1 • 0

In the Moodemere case , Murphy J , after discussing some of the earlier cases , said : 11

3 As in the United Malaya n Banking Corpn Bhd v Roland Cho ong Shin Cheong (1991) 1 MSCLC 90 , 697 (pro visi on absolving debenture holder from liability for remunera i t on .)

4 Re Gabriel Controls Pte Ltd (1983) 6 ACLR 684 ; Gomba Holdings UK Ltd v Minories Finance Ltd [1988) 1 WLR 1231 , CA.

5 [1911) 1 KB 806 , CA

6 See Moodemere Pty Ltd v Waters {1988) VR 215 at 2 19 per Murphy J commenting on the discu ssion in the first edition o f this b ook at 177 .

7(1911) 1 KB 806 .

8 See [1911) KB 806 at 814 per Scrutton J . the debentu re deed d i d not contain a clause sta t ing that thereceiver should be the agent of the company.

9 [1988) VR 215

10 Re Orienta l Ho t els Co *(1871) LR 12 Eq 126 (where the liquidatorin his capacity as) receiver got his expenses of reailzation: (1871) LR 12 Eq 126 at 132 and135;)Re Regen'ts Cana/ Ironworks* Co *(1875)3 Ch D 411 at 427 (liqui dator);Batten v.*

Wedgwood Coal and I ron Co *(1884) 28 Ch 0317; Re Universal Distributing*Co*Ltd (1933) 48 CLR 171 (liquidator;) MoodemerePly Ltd v Waters [1988) VR 215 (receiver).*

1 1 (198 8) V R 21 5 a t 22 1 "

[9] In the present case, the defendant regulators were unclear who the mind and management of the troubled bank were. Counsel for the claimant listed the tasks that the claimant was retained to undertake. He was required to:

I. " Determinethe o wnershipof the Bank as well a s the mind and managem ent , from the inception of the Bank to date .

II. Clarif y th e source an d own e s r hip o f fund s use d t o c apit a i l z e th e Ban k .

Ill . Ensure that internal controls are adequate in th e area s of the keeping of proper records , in part ic ular in the St . Vincent office and the adequacy of financial reporting ;

IV. Determine if the Bank is able to meet creditors/depositors demand s ;

V. Ensure the satisfac ti on o f the st atutory deposit requirement

VI. Oversee the appointment of proper management of the Bank , including a senior manager resident in St. Vincent .

VII. Produce a comprehensive rep ort to the Authority within three month s identifying all significant mea su res taken during the period of appo int ment , rep orting in the item s outlined above , as well identifying the remaining weaknesses of the Bank and setting out recommendations to the Authority on the way forward f or the Bank."

[1O] Given these responsibiliiets the claimant could not possibly have been the agent of the Bank, counsel argues. He must have been the agent of the defendants who should ensure that the claimant was paid. It is the position of the claimant that the defendants have a contractual obligation to pay, having engaged the claimant. The funds for such payment were in the hands of the defendants who ought to have ensured payment before handing over the funds to the court appointedliquidator. The claimant ought not to be punished for the defendants' failure to pay in a timely fashion. Again, counsel cites dicta from the **Bank Crozier** case at paragraph 44:

"...*Section* 20 *of the Act gives the Minister power to appoint a controller at the expense of*

the licens ee . Neither in that section , nor anywhere else in the Act , is there pro vision as to how to recover such expenses from the licensee. If is easy to imagi ne how such e x pense will be re covered i n the normal cour se , while the licensee is solvent and c arry ing on bu si ness ; the licensee will pay if as an expense. The problem as this case s how s, arises when the licensee goes in to liquidat ion. The expense remains t hat of the lic ensee , and the Ministe r remains entitle d t o recover i t fro m th e license e ."

[11] Counsel also reminds the court that it was the defendants, in the exercise of theirstatutroyresponsibility, who obtained from the court an order appointing a liquidator.

[12] Counsel for the defendanst also relies on the **Bank Crozier** case. In that case the appellant was appointed Controller of an international bank by the Minister, (the regulator in Grenada.) The applicable statute empowered the Minister to appoint a controller "at the expense of the licensee". The bank went into liquidation while the appellant was Controller. He thereupon approached the court for a determinationof the question whether he was entitled to be indemnified out of the assets of the bank in priority to the general body of creditors. The Court of Appeal, agreeing with the trial judge, held that the controller was not entitled to an indemnity secured by the assets of the bank. In a careful judgmentby Barrow JA, the court examined a wide range of authoriites. At paragraph 45, Barrow JA noted:

" The Co ntroller ' s claim for indemnification can s tand in no better position than his claim to recover expense s . Assumin g for present purposes tha t th e Controller is entitled to indem nifica t o i n , i t is a *claim that has no priority, by virtue of the fact of, or the law surrounding, his appointment, over the claims of other creditors in the liquidation. We are inclined to the view that the Act, by providing that the Minister may appoint* a *controller at the expense of the Bank, gave the Minister (not the Controller) an indemnyit, using the word indemnity in the sense of* a *right to be indemnified or relieved or protected from* a *burden or obligation - in this case, the obligation to meet the expense of the Controller. But it was* a *bare indemnity;* a *bare right to be*

indemnified. The Act conferred no lien or other security over the assets. And it conferre d no right to priority of payment. Because the Controller was purely a *creature of statute and not an officer of the court he had no right beyond that which the Act conferred; and the act con ferred no priority.* 11

[13] The court went on to add at paragraph 47:

" Insolvency p ra ctitioners and other s who accept app ointment as rece iv ers or controllers should s ee , before accepting app ointmen , t that s atisfa ctory provisions exist to remunerate and indemnify them. If prospective appointees do not do so , that is entirely their fault and they must n o t look to the co urt to relive against the i r i mpruden ce. It is h oped that the Controlle r ' s lette r o f engage m en t , whic h h e ha s steadfastly refused t o disclos e , cont a in e d term s adequat e t o protec t him . 11

[14] It seems to me that the conclusion which must be arrived at is that the statute requires that the claiman'ts fees must be met out of the assets of the bank. Those fees should have been paid by the liquidator. The fact that the statute would not allow those fees to be paid in priority to the general body of creditors of the bank may explain why the claimant has not sought to pursue the liquidator but to rely on his appointment by the defendants.

[15] Unfortunately the defendant corporation is a statutory body. It cannot contract out of the provisions of the International Banks Act. The Act requires that the claimant's appointment be at the expense of the bank. Any obligation for the defendants to apply the statutory deposit to paying the claimant's fees would have been frustrated by the order of the court to hand over the statutory deposit to the court appointed liquidator.

[16] The clear contractual provisions of the appointment of the claimant were to the effect that he would be paid out of the assets of the bank. No such assets remain in the hands of the defendant. The claim fails in the circumstances. It was for the claimant to ensure that assets remained in the troubled bank to satisfy his fees. He cannot now look to the defendants to pay those fees. The defendants have agreed that there should be no award of costs in favour of the defendants.

ORDER

[17] The claim is dismissed.

[18] No order is made as to costs.

Brian S. Cottle

HIGH COURT JUDGE

By Court

Registrar