30-07-04

Civil Appeal No. 2 of 2004
Cause No. 488 of 2003

IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS

IN THE MATTER OF THE *COMPANIES LAW* (2003 REVISION) AND THE *INSURANCE LAW* (2003 REVISION)

AND

IN THE MATTER OF PEGASUS INSURANCE COMPANY

BEFORE: Rt. Hon. Mr. Justice E. Zacca, President
Hon. Mr. Justice G. Collett, Justice of Appeal
Hon. Mr. Justice M. Taylor, Justice of Appeal

David Pannick, Q.C., and Ramon Alberga, Q.C., for the Appellant (Intervenor), Christopher Johnson.
A. Beltrami and Ms. Ellis, for the Attorney General, as *Amicus Curiae*

Heard: April 27, 2004

Delivered: 30th July, 2004

REASONS FOR JUDGMENT

TAYLOR, J.A.

This is an appeal by Christopher Johnson, a Chartered Accountant who has practised in the insolvency field in the Cayman Islands for more than 30 years, against a Grand Court decision denying an application by the Cayman Islands

Monetary Authority for his appointment as official liquidator in the insolvency of a Cayman-incorporated insurance company.

At the end of the sitting we allowed the appeal and said that reasons would later be provided in writing.

(a) The Hearing Below

Mr. Johnson was acting as government-appointed controller of Pegasus Insurance Company when application under s. 11(4)(d) of the *Insurance Law* (2001 Revision) and s. 94 of the *Companies Law* (2003 Revision) for his appointment as one of two joint liquidators of the company was made by the Monetary Authority under its statutory mandate to initiate liquidation proceedings in respect of insolvent Cayman companies.

Memoranda disclosed during the hearing and thereafter show that there had been communication between Mr. Justice Henderson and the Chief Justice which resulted in a decision that on any future application for his appointment Mr. Johnson would be asked to explain his conduct in a number of proceedings before the Court during recent years in which he had acted as liquidator, litigant or

witness. That opportunity presented itself when the present application came before Mr. Justice Henderson on September 5, 2003. During the hearing on that day and thereafter the judge drew six matters of concern to the Court to the attention of counsel, and granted Mr. Johnson intervenor status so that he could respond to them through his own counsel.

Five cases mentioned at the outset were: (i) *Re Transworld Bank*, an insolvency proceeding in which Mr. Justice Murphy (since retired) gave lengthy reasons in 1999 for ordering replacement of Mr. Johnson and a co-liquidator, on the grounds that they ought not to have accepted the assignment and while acting in good faith had dealt with matters inappropriately and lost objectivity; (ii) a decision given a few weeks later in 1999 in *Johnson v. Cook-Bodden* in which Mr. Justice Kellock (as Acting Judge) allowed a claim brought by Mr. Johnson in his personal capacity against a former client, but made observations critical of Mr. Johnson's evidence and denied him costs; (iii) the *Consolidated Action in Five Causes*, a proceeding involving liquidators' fees, in which Mr. Johnson had been asked by the Court (*en banc*) to seek approval of creditors' committees for his fees and had not reported back to the Court; (iv) *Uzzell v. Uzzell*, a 2001 decision in which Mr. Justice Sanderson (then full-time member of the Court) rejected Mr. Johnson's evidence and found that he had not conducted himself in a manner

appropriate to an impartial expert; and (v) an application in *Re Banco del Progreso* for appointment of Mr. Johnson as liquidator on which affidavit material had been requested but not provided. The judge later added: (vi) *In Re Latin American Bank*, a long-standing liquidation in which Mr. Johnson had been asked for a report by the Chief Justice three months earlier but was to provide it only during the course of the hearing before Mr. Justice Henderson.

Counsel for the Monetary Authority described the concerns of the Court regarding Mr. Johnson as "significant" and said that "whether or not he is a fit person for the purpose of appointment is essentially a matter for the Court to decide", but that the Authority continued to regard him as a fit person and that counsel for Mr. Johnson would respond to the points raised.

Mr. Johnson gave affidavit evidence in answer to each of the matters raised. His counsel laid emphasis on the fact that these matters had not resulted in Mr. Johnson being denied appointment or statutory powers by the Court in insolvency proceedings on at least 19 applications since 1999, and contended that the judges who made those orders must have satisfied themselves as to his fitness notwithstanding comments in earlier proceedings. Mr. Justice Henderson sought and obtained written responses in this regard from the other current full-time

members of the Court – the Chief Justice, who had made two of the 19 orders, and Mrs. Justice Levers, who had made one of them.

Counsel for Mr. Johnson objected to Mr. Justice Henderson consulting with the other judges, and urged that he put their answers out of his mind. In response to a question, counsel for Mr. Johnson nevertheless pressed the judge *not* to recuse himself, a course that would have resulted in the application being heard by an Acting Judge who had not been consulted but which counsel said would be "quite inappropriate and undesirable". Mrs. Justice Levers, recently-appointed full-time member of the Court, said in her reply that when she appointed Mr. Johnson as liquidator she was unaware of earlier proceedings in which his conduct had come into question. The reply of the Chief Justice was more extensive and its consideration by Mr. Justice Henderson vigorously opposed by counsel, both below and on the appeal. Perhaps as a result of its content, Mr. Johnson's attorneys shortly before the hearing of the appeal requested and were provided with copies of other memoranda that had passed between the Chief Justice and Mr. Justice Henderson. Four of these were dated before the hearing and one after its conclusion but before delivery of judgment.

Because of the importance attached on appeal to these memoranda, they are reproduced in chronological order in the attached Schedule. Documents 5 and 6 are those provided to counsel during the hearing below. Documents 1, 2, 3, 4 and 7 are those produced shortly before the appeal hearing. Document 8 is the note which accompanied Documents 5 and 6, and Document 9 is that with which counsel were provided the other five memoranda.

In his October 16, 2003, memorandum (Document 5), that disclosed during the hearing, the Chief Justice disagrees with the suggestion of counsel before Mr. Justice Henderson that his appointment of Mr. Johnson as liquidator in the *Banco del Progreso* and *Banco de Prestamos* insolvencies on July 18, 2003, less than two months prior to the hearing before Mr. Justice Henderson, meant that the Chief Justice had satisfied himself, despite judicial comments in the earlier cases mentioned, that Mr. Johnson was a fit person to be an official liquidator. The Chief Justice adds: "Whether objectively that is a proper implication, will of course be a matter for you". The Chief Justice says that the only matter raised before him in connection with the appointment of Mr. Johnson in that case was the provision of an indemnity, which had been left by Mr. Justice Sanderson for later resolution. The Chief Justice says he was told that disruption would result were

Mr. Johnson not appointed in that case, since he had already for some time been in charge of the insolvencies in the capacity of controller.

For the benefit of counsel, to whom the memorandum was to be passed, the Chief Justice also records that he had earlier expressed concern in discussions with Mr. Justice Henderson and other judges regarding Mr. Johnson's suitability as a Court-appointed liquidator, mentioning as its basis the same six cases referred to by Mr. Justice Henderson during the present hearing. With respect to the *en banc* proceeding, which had included a request that Mr. Johnson seek approval of proposed new fee rates from creditors' committees, the Chief Justice says: "The unfortunate impression left with me was that Mr. Johnson's primary concerns were about his fees". The Chief Justice notes that "issues of common concern relating to the supervisory duties of the Court" are ordinarily discussed among the judges, as a matter of course, and that there had been discussions with respect to the performance of Mr. Johnson "as they would be if similar matters arise in relation to any other officer of the Court".

The Chief Justice adds that if an application for Mr. Johnson's appointment were now to come before him he would feel obliged "to raise similar matters of concern about Mr. Johnson's suitability for further appointment".

In his affidavit evidence in response to the matters raised Mr. Johnson describes his experience as a Chartered Accountant in the insolvency field in the Cayman Islands over a period of 30 years, mentions his contributions to his profession and the community, and submitts references. He says that he is senior Cayman Islands partner in a leading international accounting firm and a Fellow of the Institute of Chartered Accountants of England and Wales, that he has been Court-appointed Joint Provisional Liquidator or Joint Official Liquidator in more than 30 Cayman insolvencies and that he has acted also as liquidator in more than 600 voluntarily-initiated Cayman insolvencies.

In reasons for judgment of February 4, 2004, Mr. Justice Henderson accepts Mr. Johnson's responses with respect to three of the six matters raised -- the failure to report concerning issues raised during the *en banc* proceeding and on the *Banco del Progesso* application and the observations of Mr. Justice Sanderson in the *Uzzell* case, which Mr. Justice Henderson finds not to reflect on Mr. Johnson's fitness as a liquidator. The judge describes the remaining three matters -- *Transworld, Cook-Bodden* and *Latin American Bank* – as "more troubling". Viewed collectively, he says, "they take on a weight and character which is perhaps lacking when each is viewed in isolation".

The judge concludes, "with some hesitation and considerable regret", that he should deny the present application for Mr. Johnson's appointment.

(b) Subsequently-Provided Memoranda

Shortly before the hearing of the appeal Mr. Johnson's attorneys requested copies of any other written communications between Mr. Justice Henderson and other members of the Court that related to the present matter and were "relevant to the decision making process" and also drew to the judge's attention an order of May 2, 2003, by which he had himself granted Mr. Johnson, as joint controller in the *Western Oceanic Bank* insolvency, the powers of a receiver or manager provided by s. 18 of the *Bankruptcy Law*.

By his memorandum of March 22, 2004, (Document 9) Mr. Justice Henderson informed counsel that he did not think there in fact were any communications "relevant to the decision making process", but forwarded "for the sake of completeness" five other memoranda that had passed between the Chief Justice and himself dated between May 16, 2003, and January 15, 2004, (Documents 1, 2, 3, 4 and 7), four before the hearing and one after the hearing but before judgment. With respect to the order granting additional powers to Mr. Johnson in the *Western*

Oceanic Bank insolvency, the judge said that the matters raised on the present application were not known to him when he made it.

The following is a summary of points made in the memoranda disclosed, dealt with in their chronological sequence.

By memorandum of May 16, 2003, (Document 1) Mr. Justice Henderson tells the Chief Justice that after he had made the above-mentioned order of May 2, 2003, in the *Western Oceanic Bank* case, it was suggested that such orders should not be made because of Mr. Johnson's "past involvement with the Court". The judge goes on to record results of an investigation he then made into four cases in which Mr. Johnson had figured, all being among those later cited during the present hearing. He concludes by asking whether counsel in the *Western Oceanic Bank* case should be recalled for a review of that order, noting that with the exception of the *en banc* proceedings he was unaware of the cases mentioned when he made the order. In a later extended version of this memorandum, dated May 29, 2003, (Document 2) the judge adds two more cases: *Deloitte & Touche AG v. Christopher Johnson et al.*, a 1999 decision of the Privy Council involving the liquidation of Omni Securities Ltd. in which Mr. Johnson's position as liquidator was challenged -- a matter that was not to be taken up during the present

proceedings -- and *Transworld,* a case to be mentioned by the judge at the outset of the hearing. This extended version of the memorandum does not in fact appear to have been forwarded to the Chief Justice until early July.

In his reply to Mr. Justice Henderson of June 24, 2003, (Document 3) the Chief Justice refers to the judge's first memorandum, regarding the *Western Oceanic Bank* case, notes that this had been discussed between the judges early in June, recalls that "you would be awaiting the next step in the proceedings to bring the concerns to the attention of Mr. Johnson", and asks whether this occurred. The Chief Justice refers in this memorandum to the decision of Mr. Justice Murphy in *Transworld* and also to the *Latin America Bank* liquidation, which was to become the sixth case raised by Mr. Justice Henderson during the present proceedings. The Chief Justice concludes with the statement:

> I am now resolved to "grasp the nettle" as I am satisfied that Johnson should be put on notice of our concerns which could lead to the Court no longer appointing him or approving of his appointments.

Mr. Justice Henderson responds by memorandum of July 2, 2003, (Document 4), forwarding his May 29 extended memorandum (Document 2) and noting that it had been agreed "to await the next occasion upon which Johnson applies for appointment and raise the whole issue then".

The next communication (Document 5) is the already-mentioned memorandum of the Chief Justice of October 16, 2003, that disclosed during the hearing, which responds to Mr. Justice Henderson's question whether the appointment of Mr. Johnson by the Chief Justice two months earlier in the two bank cases meant the Chief Justice had satisfied himself of Mr. Johnson's fitness, despite the concerns that had now been raised.

The Chief Justice deals first with Mr. Johnson's failure to report on matters raised during the *en banc* proceeding, something that Mr. Justice Henderson was in the end to find adequately explained, and goes on to say:

> As a judge of this Court I have been involved collegiately in discussions with the other judges in respect of many matters which respectively come before us involving insolvency matters. A number have involved Mr. Johnson.
>
> Among ourselves, issues of common concern relating to the supervisory duties of the Court are discussed as a matter of course, in relation to Mr. Johnson, as they would be if similar matters arise in relation to any other officer of the Court. As judges we must repose complete confidence and trust in persons whom we appoint and this is perhaps most acutely so in the context of trustee, receivership and liquidators appointments.
>
> For these reasons, the judges have over the years shared a collegiate concern over matters which might properly reflect upon Mr. Johnson's suitability for appointment to any Court appointed office.

The Chief Justice then refers to four cases mentioned by Mr. Justice Henderson in these proceedings – *Transworld*, *Cook-Bodden*, *Uzzell* and *Latin American Bank* – of which he says that they have "an accumulative effect such that they would have compelled me to raise concerns about the fitness of Mr. Johnson to be appointed similar to those which I understand you have raised". With respect to *Banco del Progreso* and *Banco de Prestamos,* the Chief Justice makes the statements already mentioned regarding the circumstances under which he appointed Mr. Johnson in those cases. The Chief Justice notes that three months had gone by since he asked Mr. Johnson for a report on the long-standing *Latin American Bank* liquidation. He goes on to say that this alone would justify an enquiry into the manner in which Mr. Johnson had been conducting the large number of insolvencies in which he had been appointed liquidator.

By memorandum of October 21, 2003, (Document 6) Mrs. Justice Levers says only that when she appointed Mr. Johnson as liquidator she was unaware of views that other judges had expressed in earlier cases.

The final memorandum is that of January 15, 2004, (Document 7) sent by Mr. Justice Henderson to the Chief Justice following conclusion of the hearing but before judgment. The judge here records what he describes as a "cornerstone

argument" advanced for Mr. Johnson, that intervening appointments by other judges constituted evidence from which the Court was bound to infer that the judges who made those appointments did not share the concerns expressed by Mr. Justice Henderson, and that those judges "were content with Mr. Johnson's suitability and performance". The judge says that the has examined the Court files relating to these appointments and has found nothing in the record that would have served to bring the previous matters mentioned to the attention of the appointing judges in those cases. The judge observes:

> Because of the importance accorded to the submission, I asked Mr. Johnson's counsel if I could speak to the Chief Justice and Levers, J. (but not to the relevant acting judges) to determine whether, and to what extent they directed their minds to the alleged misbehaviour prior to making the respective appointments. Mr. Johnson's counsel agreed to this initially, then said he would only agree to it if he were present, and eventually said that he would not agree to it at all. His ultimate position was that I was bound to draw the inference contended for but prohibited from ascertaining whether the issue was given mature (or, indeed, any) consideration.

The judge records that he had nevertheless proceeded to ask the Chief Justice and Mrs. Justice Levers for their responses to the submission made, and that he had passed their responses to counsel.

Mr. Justice Henderson notes that if the argument advanced were correct -- that he could not "have regard to information obtained from other judges or opinions

held by them, even if those are fully disclosed"-- the result would be "that those who are in the best position to assess the fitness and performance of a liquidator – the judges of this Court – cannot pass that information on in any useful way to a colleague who is considering a similar application".

The judge concludes by posing the question whether it was, indeed, "procedurally inappropriate for me to request and consider the information?"

(c) The Cases of Consequence

The cases that proved of consequence to the decision of Mr. Justice Henderson are two in which judicial disapproval was expressed of Mr. Johnson's conduct or evidence four years earlier – *Transworld* and *Cook-Bodden* – and the long-standing *Latin America Bank* case, in which Mr. Johnson had been asked for a report by the Chief Justice three months earlier and was to provide it only during the course of the hearing before Mr. Justice Henderson.

There is nothing in the memoranda between the judges regarding these three cases that was not known to Mr. Johnson, contained in the Court record and brought to the attention of counsel during the hearing. The only opinion

concerning these matters given by the Chief Justice was that he shared the concern that Mr. Justice Henderson had expressed to counsel regarding them. Evidence considered by the judge included: (i) the reasons for judgment in the two 1999 cases; (ii) the fact that Mr. Johnson had not promptly provided a report in the *Latin American Bank* case; (iii) responses made by Mr. Johnson in his affidavits and by his counsel; and (iv) the statements of the Chief Justice and Mrs. Justice Levers in reply to the suggestion of counsel that they had satisfied themselves as to Mr. Johnson's suitability in light of the earlier cases mentioned when between them they granted three of 19 intervening orders in his favour.

The judge refers to the 1999 decision in the *Transworld* case, in which Mr. Justice Murphy concluded that Mr. Johnson and his partner should be replaced as joint liquidators, finding that their firm had been auditors of the company, that the company had at all material times been insolvent, and that they ought not, according to the rules of the Institute of Chartered Accountants, in these circumstances to have accepted appointment as liquidators, or ought in any event to have resigned once they began to doubt its solvency. Mr. Justice Henderson cites excerpts in which Mr. Justice Murphy also finds that Mr. Johnson and his co-liquidator had been "aggressively adversarial", that they lacked independence from former management, that they maintained a different view of the company's

viability to that of the majority of creditors, and that they failed to investigate former management and appeared to cling unreasonably to the viability of a legal action, the sole justification for continuation of the liquidation.

In ordering their replacement as liquidators Mr. Justice Murphy emphasized that he attributed no bad faith to Mr. Johnson or his co-liquidator.

Less than six months later, when it seems that he must have had these findings in mind, Mr. Justice Murphy appointed Mr. Johnson as liquidator in the *Optimum Fund* winding-up, thereby seeming to confirm the view that emerges from his judgment in *Transworld* that Mr. Johnson's conduct in *Transworld* did not reflect on his honesty or integrity as an officer of the Court.

In affidavit evidence in the present proceedings Mr. Johnson says that he acted throughout in *Transworld* on the basis of competent legal advice, including legal advice as to the solvency of the company and his continuation in office, and that he did not believe the creditors would have financed an investigation of former management. Mr. Justice Henderson concluded that whether he should have acted, and continued to act, were matters falling within Mr. Johnson's own professional code and on which he required no legal advice, and that were he in doubt whether

the creditors would have financed investigation of former management he should have sought direction from the Court. Mr. Justice Henderson notes, however, that Mr. Justice Murphy appointed Mr. Johnson as liquidator in another insolvency six months after his decision in *Transworld*, and says that the *Transworld* decision would not alone have the significance that it acquired when considered with the other two cases of concern.

In *Johnson v. Cook-Bodden*, decided less than two months after *Transworld,* Mr. Justice Kellock gave judgment in favour of Mr. Johnson and set aside a conveyance between a former client and his sons as fraudulent, Mr. Johnson having obtained judgment against the transferor for $200,000. Mr. Justice Kellock nevertheless expressed the view that Mr. Johnson's earlier affidavit evidence was inconsistent with that given by him at trial, that his evidence at trial was 'tailored' to avoid a defence of maintenance and champetry, and that he had not satisfactorily explained his conduct in acting personally for the client in a situation of apparent 'conflict'. The trial judge described Mr. Johnson's evidence on the last point as "evasive", characterized his testimony in this and other respects as "less than frank", and because of these findings denied Mr. Johnson an order for costs.

Mr. Justice Henderson says in his reasons for judgment that he cannot read the *Cook-Bodden* judgment except as finding that Mr. Justice Kellock disbelieved Mr. Johnson's testimony. Mr. Justice Henderson rejects Mr. Johnson's assertion in his affidavit in these proceedings that the evidence he gave was truthful and that Mr. Justice Kellock ought not to have disbelieved him. Mr. Justice Henderson says that he could not "go behind the judgment and enquire into the correctness of these findings on credibility", even if he wished to do so, these being findings "in a trial at which Mr. Johnson was party".

With respect to Mr. Johnson's delay in providing the report requested by the Chief Justice in the *Latin American Bank* liquidation, Mr. Justice Henderson says that such inability or unwillingness to render timely reports to the Court suggested that Mr. Johnson had been, at best, too busy with other business properly to carry out his duties to the Court as a liquidator.

(d) The Law

No case is mentioned by Mr. Justice Henderson, nor was any cited to us, that lays down the test to be applied on an application for appointment of a liquidator,

emphasis instead being placed on decisions given on applications for the replacement of liquidators already in place.

The basis on which Mr. Johnson's suitability is called into question becomes apparent from the opening passage of the judge's discussion of the law. The judge here cites criteria listed in s. 3 of the *Monetary Authority Law* (2003 Revision) for selection by the Monetary Authority of its own appointees -- "(a) honesty, integrity and reputation; (b) competence and capability; (c) financial soundness" – and goes on to state that: "Mr. Johnson's competence, capability and financial soundness are not in issue". The judge outlines the duties of official liquidators, notes that while the views of the Monetary Authority are important they cannot be determinative, and adds that the Court must have confidence that its appointees will put facts and issues fairly before it when the Court is exercising its supervisory jurisdiction. The judge concludes that:

> The court has a broad discretion to determine who its officers should be, although it is a discretion to be exercised carefully, having regard to the need to deal fairly with the reputation of the nominee. Because of the importance of an official liquidator's duties, the large sums of money with which he must deal, and the fact that (with respect to Cayman Islands companies, at least) most creditors and shareholders are in offshore jurisdictions, the court is entitled to appoint individuals in whom it has a high level of confidence.

The judge expresses the view that "the circumstances in which the court will refuse an initial appointment are somewhat broader than those in which it will act to remove a liquidator it has already appointed".

In reviewing the decision of Mr. Justice Millett in *Re Keypack Holdings Ltd.* (1987) 3 BCC 558, a case involving removal of a liquidator, the judge adds emphasis to a number of passages. These include a quotation from Vice-Chancellor Malins in *In Re Marseilles Extension Railway and Land Co.*, (1867) LR 4 Eq. 692 (at p. 694), that it will be sufficient to justify removal of a liquidator that "a considerable number of creditors were opposed to his continuation in office", and reference to *Re Adam Eyton Ltd.* (1887) 36 Ch.D. 299, in which the Court of Appeal held it unnecessary to justify the removal of a liquidator "that there should be anything against the individual". A third passage emphasized by Mr. Justice Henderson is the statement of Mr. Justice Millett that:

> Circumstances vary widely, and it may be appropriate to remove a liquidator even though nothing can be said against him, either personally or in his conduct of the particular liquidation.

Mr. Justice Henderson draws from the authorities the proposition that "a showing of unfitness" is not necessary for the removal of a liquidator, that this "would apply with even more force to the question of fitness for appointment", and that it

follows that there would therefore be "no need for any showing of a specific act of misconduct to justify a refusal to appoint".

Since on an application for appointment the burden of establishing the suitability of the nominee necessarily falls on the applicant, it follows that a soundly-based unresolved doubt as to suitability would suffice for denial of the application. In this sense the appointment test could properly be described as less demanding than that applicable on an application for removal.

It would not, however, be correct to say, in the case either of appointment or removal, that the discretion of the Court may be exercised against nominee or incumbent except on the basis of sound evidence having relevance to the best interests of the liquidation. Where, as appears here to be the case, the ground for denial of appointment does go to the honesty or integrity of the nominee -- where, to paraphrase the words (above quoted) of Mr. Justice Millett, something *is* indeed alleged "against the individual"– that evidence must have cogency and weight appropriate to the seriousness of the allegation. A less demanding test would be applicable where the concern has to do, for instance, with suitability to meet the need of the particular liquidation -- where the objection raised involves no reflection on the character of the nominee.

In a case such as the present, involving honesty, integrity, reputation and thus the professional future of the insolvency practitioner concerned, a particular duty of fairness is necessarily imposed on the court.

(e) Conclusion

In view of the criticism made by counsel before us, it should be said at the outset that no impropriety was involved in the judges communicating with each other concerns of the sort mentioned in their memoranda.

The Court must determine the suitability of persons proposed for appointment, for the obvious purpose of ensuring that those considering investing in, or doing business with, Cayman-incorporated companies will have confidence that their interests will properly be protected in the present circumstances by the Court and those acting on its behalf. The investors, policyholders and creditors concerned in the present case were not made parties to the application, so that the duty of ensuring that their interests were protected fell entirely on the Court, a point that was emphasized by counsel for the Monetary Authority.

There is nothing in the evidence to rebut the presumption that the judge formed his own independent view of the matters in issue, as indeed the Chief Justice observed that he was bound to do. It is to be presumed that the judge took into account the information and opinions of the Chief Justice only for the purpose of ensuring that the concerns mentioned by the Chief Justice were answered. He was not bound to conclude that judges who previously appointed Mr. Johnson had taken into consideration decisions of others in earlier cases mentioned during the hearing; in this regard his communication with the other judges cannot be regarded as improper. Since their responses dealt in any event with only three of 19 cases of intervening appointment, however, they could do little to advance the inquiry. While it would undoubtedly have been better had the Attorney General been asked to provide counsel to act as *amicus curiae* before Mr. Justice Henderson, as was done for the purposes of the present appeal, failure to adopt that course did not render the proceedings below objectionable.

Had the intervening appointments been made with knowledge of all matters before Mr. Justice Henderson, this would not have relieved the judge of responsibility to reach his own conclusion, but the fact of the appointment made by Mr. Justice Murphy in the *Optimum Fund* winding-up, less than six months after his decision in *Transworld*, has obvious relevance in reinforcing the impression

created by a reading of the *Transworld* decision that Mr. Justice Murphy did not mean by his findings in *Transworld* to suggest that Mr. Johnson was unfit to act in future as a Court-appointed liquidator.

In dealing with the *Cook-Bodden* decision, the judge explains as follows the proposition that he is bound to accept the credibility findings of the trial judge in that case, and could not entertain Mr. Johnson's response:

> I am unable to read this judgement in any way other than as a finding that Kellock, Ag. J., did not believe the sworn testimony of Mr. Johnson. There is nothing ambiguous in these findings. Moreover, this was a finding of fact in a trial at which Mr. Johnson was a party; even if I were inclined to do so, I would not be at liberty now to go behind the judgment and enquire into the correctness of these findings on credibility.

It seems from the language here used that the judge may have taken the view that the law of *res judicata* prevented him from considering Mr. Johnson's response – this possibility emerges from the statement that: "this was a finding of fact in a trial at which Mr. Johnson was a party".

According to the rule in *Hollington v. Hewthorn*, [1943] K.B. 587, a conviction on a 'not guilty' plea is no more than an opinion, and inadmissible in any other proceedings involving the same incident. The authority of that case has

largely been over-ridden by statute in most jurisdictions, but only to the extent that a related criminal conviction may now be adduced as evidence in subsequent civil proceedings. Where this is permitted, proof of conviction amounts to *evidence* that the accused committed the offence, but not as conclusive evidence. Except to the extent that there has been statutory change, the rule in *Hollington v. Hewthorn* still stands for the proposition that a judicial finding is generally inadmissible as evidence in a subsequent proceeding. Where, as here, the issue raised involves suitability for appointment by the Court, reference to judicial opinion, whether given in a judgment or given extra-judicially, must be regarded as proper insofar as it gives rise to a concern to which the nominee is asked to respond. It cannot, however, be that judicially-expressed views are to be regarded as conclusive, so that any response must, or even may, be disregarded.

The law of *res judicata* is said to embrace the principles of "*res judicata* estoppel" and "merger in judgment": see *Spencer Bower Turner and Handley on Res Judicata* (3rd Ed.) at pp. 1-3. The former applies to determinations without which a judgment cannot stand, but operates only in subsequent proceedings between parties to the litigation in which the earlier judgment was given; it does not operate as a presumption in favour of the correctness of the earlier finding, but as a rule of law applied as between parties to an action that prevents relitigation of

issues judicially decided between them. The principle of merger simply prevents double recovery. Thus findings as to credibility in Mr. Johnson's action against his former client could not under the law of *res judicata* be binding in this subsequent, quite different, statutory proceeding between others.

Since the Court was not entitled to disregard Mr. Johnson's response to the credibility findings in *Cook-Bodden* decision, it follows that its discretion must be said to have been exercised without taking relevant factors into account, and that the exercise must be undertaken anew by this Court.

(f) Reconsideration

Of the three cases of ultimate concern it seems that only one, *Cook-Bodden*, could be said to touch on Mr. Johnson's integrity, which seems to be the focus of the inquiry undertaken in these proceedings.

From the reasons in *Johnson v. Cook-Bodden*, as reported at [1999] CILR 399, it appears that the trial judge's criticism of Mr. Johnson's evidence was principally concerned with two findings: (i) that Mr. Johnson did not properly explain how acting for Mr. Cook-Bodden in a private capacity, rather than on behalf of his

accounting firm, resolved any 'conflict' involved in rendering accounting services for a client to whom he had loaned money; and (ii) that Mr. Johnson 'tailored' his evidence at trial so as to meet a late-raised defence that the loan agreement was void under the law relating to maintenance or champetry.

In answer to the first point, Mr. Johnson explains in affidavit evidence in the present proceedings that the situation did not involve any 'conflict' under the rules of his profession –there was no professional objection to him advising a client to whom he had advanced money – but involved a rule applied within his own firm that members were not to act on the firm's behalf for persons with whom they had personal dealings. Mr. Justice Kellock appears to have accepted Mr. Johnson's evidence that he intended to act in his personal capacity for Mr. Cook-Bodden, rather than on behalf of his firm. But the judge did not understand how this could resolve the 'conflict' problem. The judge said that Mr. Johnson had provided no explanation on that point, and that he therefore concluded that "Johnson was being less than frank with the Court". Mr. Johnson's answer in the present proceedings, further dealt with below, provides an explanation which, had it been before the trial judge, might well have put this concern to rest.

The finding that Mr. Johnson 'tailored' his testimony at trial so as to avoid the defence of maintenance or champetry is based on Mr. Johnson's evidence regarding his reasons for making the loans and his evidence with respect to when it was that he "became concerned" about being repaid.

On the first point, Mr. Johnson said in an affidavit two years before trial that Mr. Cook-Bodden, whose mother had been a close friend and former neighbour, came to see him in 1994, the year after his mother's death, and sought help with problems regarding the estate of a great-grandfather of which he was administrator, and with respect to personal financial problems. In this affidavit, Mr. Johnson says he agreed to loan Mr. Cook-Bodden money because of Mr. Cook-Bodden's net worth, which included his residence in Snug Harbour (then being offered for sale), and because Mr. Cook-Bodden stood to receive substantial benefit from his great-grandfather's estate. At trial Mr. Johnson said he made the loans on the understanding that the Snug Harbour property would be sold, which he believed would realize $350,000, and did so informally without taking security, as a "handshake deal", because of his long friendship with Mr. Cook-Bodden's late mother. The trial judge finds that Mr. Johnson's evidence at trial invited the conclusion that he loaned the money because of friendship with Mr. Cook-Bodden's mother, as a matter of "charity". The judge concludes that

Mr. Johnson's affidavit evidence that he did so both because of Mr. Cook-Bodden's net worth, which would have included the Snug Harbour property, and his expectation from the estate, including land elsewhere, was "closer to the truth". The judge concludes that Mr. Johnson's motivation was "more likely" desire to become advisor to the administrator of a large estate for which he expected to be paid. The judge does not, however, accept that any land -- either the Snug Harbour property, then being offered for sale, or the land in issue in the estate -- was mentioned at the initial meeting. The judge concludes that it was likely that Mr. Johnson's motivation for loaning the money was *in part* that he considered it "seed money" for income to be derived from advising the estate and *in part* because of his friendship with Mr. Cook-Bodden's late mother. The judge accepts that Mr. Johnson was, as he testified, motivated by friendship with his former neighbour, finds that this was not the whole motivation but concludes that expectation of repayment from proceeds of the Snug Harbour property was not a "prime factor" in the decision, "if it was a factor at all".

On the second point relevant to whether Mr Johnson 'tailored' his evidence, the testimony he gave as to when it was that he became concerned that the money might not be repaid, the statement of claim suggests that this was when he discovered that Mr. Cook-Bodden had been replaced as administrator of the estate

and in his affidavit of June 26, 1997, which predates the raising of the champetry defence, Mr. Johnson says he became concerned in May, 1997, when he learned that Mr. Cook-Bodden had been replaced as administrator, and then sought to attach the Snug Harbour property, only to find that it had been conveyed. The judge concludes that Mr. Johnson became concerned not when he realized Mr. Cook-Bodden would be replaced but when he realized that he would not himself succeed Mr. Cook-Bodden as administrator. The judge says he suspects it was the refusal of the attorney Mr. Johnson had retained for Mr. Cook-Bodden to act further in the matter that caused that realization, and that it was this that prompted Mr. Johnson to sue for recovery of the money.

The findings of consequence regarding Mr. Johnson's evidence seem concerned with what Mr. Johnson said regarding his state of mind at two periods, respectively five and two years prior to trial, with regard to matters that had no ultimate bearing on the outcome of the trial. The state of a person's mind has memorably been judicially pronounced as much a matter of fact as the state of his or her digestion, but neither is necessarily susceptible to precise recall with the passage of time, and the memory of honest witnesses on such a matter may well be influenced by subsequent events, as juries are reminded. The trial judge deals cautiously with Mr. Johnson's evidence regarding his state of mind, saying that his

actions were *more likely* motivated by desire to become financial advisor to the estate than by friendship with Mr. Cook-Bodden's mother, but accepting that the latter was nevertheless a motivating factor, and accepting that the prospect of recovery from the Snug Harbour property *might* have been a factor, while finding that it was not a *prime* factor. It is with reference to findings such as these that the judge characterizes Mr. Johnson's evidence as "less than frank". There is nothing in the reported decision to indicate what Mr. Johnson said at trial in responding to suggested inconsistencies between his affidavit evidence and testimony at trial, or that he was, indeed, invited to respond to them.

In his first affidavit in these proceedings, Mr. Johnson says it is unclear from the reasons for judgment what evidence the judge disbelieved.

Mr. Johnson says in his first affidavit that there was a rule of his accounting firm that prevented members from acting on its behalf for those with whom they had private dealings, but that this did not prevent him from acting in such circumstances on his own behalf, provided that he had consent of his partners, and that one at least of his two partners consented in this case. He says that he may have made an error of judgment in acting for Mr. Cook-Bodden, but that no professional 'conflict' problem was involved.

In his second affidavit Mr. Johnson accepts that his evidence at trial may sometimes have been confused, or the result of faulty recollection, but denies that he told lies or sought to mislead the Court. In the absence of some record of his actual testimony, Mr. Johnson's responses concerning his evidence must be taken into account, and are entitled to some weight.

In discharging its duty of fairness, weight must also be given to the fact that during the period between the 1999 decisions in the *Transworld* and *Cook-Bodden* cases and the hearing before Mr. Justice Henderson the Court made at least 19 orders in liquidation proceedings approving Mr. Johnson's appointment as an officer of the Court or granting him special statutory authority. These orders were made on 15 different occasions, and in 15 different liquidation proceedings, including the present liquidation – while acting as government-appointed controller of the Pegasus company, Mr. Johnson was granted authority under s. 18 of the *Bankruptcy Law* in December, 2002, by Mr. Justice Sanderson. The Court having decided, for whatever reason, to entrust Mr. Johnson with further authority and powers on so many occasions, despite criticism in the *Transworld* and *Cook-Bodden* decisions, his performance falls to be judged by the manner in which he thereafter exercised the powers so entrusted to him, and the earlier decisions necessarily lose much of their relevance.

The complaint of consequence relating to events subsequent to the *Transworld* and *Cook-Bodden* decisions is that of delay in responding to the Chief Justice's request for a report in the *Latin American Bank* insolvency. Mr. Johnson explained this as due at first to difficulties in meeting with his legal advisor, including the absences of each of them from the Islands, and later to his involvement in the present proceedings. He said that he cancelled off-island business and personal trips to deal with the matter. His report when made was accepted by the Chief Justice as adequately dealing with the issues raised. Had Mr. Johnson not provided his report before decision was given in the present proceedings, that might have been good reason to deny him further appointment until he did so. His failure to report promptly in the *Latin American Bank* case could not, however, fairly warrant the bringing forward in the present circumstances of the quite different complaints made in the two decisions of four years earlier.

In summary: (i) in *Transworld* Mr. Justice Murphy said "I do not for a moment attribute any bad faith to Johnson or Jenkinson", and from his appointment of Mr. Johnson six months later it is clear that he did not consider Mr. Johnson's conduct in that case to be of a character that demonstrated him unfit for further appointment; (ii) the findings in *Cook-Bodden* cannot in the face of Mr. Johnson's explanation and denial, without any record of his actual evidence,

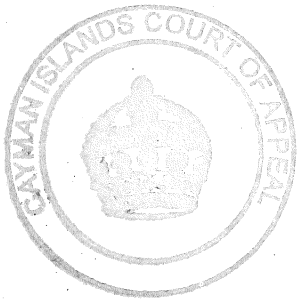
fairly be regarded as establishing that he gave testimony in that case that he knew to be false; (iii) with the subsequent lapse of four years, during which 19 orders were made by the Court granting Mr. Johnson appointments and powers, these decisions lose much of any relevance they might earlier have had as a basis for impeaching Mr. Johnson's fitness; (iv) the delay in providing his report in the *Latin American Bank* case does not reflect on Mr. Johnson's character or integrity, the focus of these proceedings, and cannot give renewed relevance to criticism made in the *Transworld* and *Cook-Bodden* decisions.

(g) Disposition

Weighing the evidence provided by the three cases of ultimate concern against the period of Mr. Johnson's practice, both before and after the two critical decisions, and taking into account both the references regarding his character and professional standing provided by members of the legal and accounting professions and the opinion of the Monetary Authority, there does not appear to be an adequate basis for denying his appointment in this case.

The appeal was accordingly allowed, the decision of the Grand Court set aside, and an order made granting the application for appointment in the terms sought by the Cayman Islands Monetary Authority.

M. R. Taylor, J.A.



ZACCA P.

On December 13, 2002 the Governor in Council on the recommendation of the Cayman Islands Monetary Authority appointed Christopher Johnson and Nicolas Freeland of Price Waterhouse Coopers to assume control of Pegasus Insurance Company under section 11(1) (vii) of the Insurance Law (2001 Revision).

The Authority petitions for an order under section 94 of the Companies Law (2003 Revision) for a winding up and for the appointment of Messrs Johnson and Freeland as joint official liquidators of the Company. Up to the time of the petition Messrs Johnson and Freeland continued to assume control of Pegasus Insurance Company.

The petition came before Henderson J. on September 5, 2003 in chambers when he expressed certain concerns as to the fitness of Christopher Johnson to be appointed a joint official liquidator.

On October 7, 2002 Henderson J. granted leave to Christopher Johnson to intervene in the proceedings.

The matter next came before Henderson J., in chambers, on October 15, 2003. Mr. Sibblies who appeared on behalf of the petitioner addressed the court on the concerns of the judge. Some of the discussion between Henderson J. and Mr. Sibblies is as follows:-

The Court: Were you aware of the *Transworld* case prior to appointing Mr. Johnson as controller.

Mr. Sibblies: We were aware of the case, but we are also aware - that since that time Mr. Johnson has been appointed by the court as a liquidator – In the absence of a general ruling that is that he is unfit for all liquidations we are left in a position where Mr. Johnson is otherwise qualified to act, in our view, as a liquidator.

The Court: I take it that whenever the Authority nominates someone for appointment, the authority is saying to the court implicitly we know this person. We have given thought to his appointment. We are satisfied that he is a fit person to fulfill this role.

Mr. Sibblies: I would think that would be a reasonable assumption, My Lord.

The Court: So you must have done that in this case.

Mr. Sibblies: Yes.

The Court: That was your initial position.

Mr. Sibblies: That would be the normal course or the way in which we go about making suggestions for persons to be appointed. We would not knowingly appoint someone who we had information which would lead us to believe that he was not a fit and proper person.

The Court: So is it your current position that you continue to urge his appointment.

Mr. Sibblies: At this stage yes, My Lord.

The Court: So you are, at present, satisfied that he is a fit person to be appointed a joint official liquidator.

Mr. Sibblies: My Lord, I would have to say yes.

The Monetary Authority is a statutory body which oversees financial institutions and other off-shore companies. It has a very important task especially in an off-shore and tax-free country as the Cayman Islands is.

Section 3 of the Monetary Authority Law (2003 Revision) sets out the factors to be taken into account by the Authority in making a decision on who to appoint:

> "In determining for the purpose of this Law whether a person is a fit and proper person, regard shall be had to all the circumstances, including that persons –

(a) honesty, integrity and reputation;
(b) competence and capability;
(c) financial soundness."

Section 3 of the Banks and Trust Companies Law (2003 Revision) is in identical terms.

Henderson J. found that Mr. Johnson's competence, capability and financial soundness were not in issue. He went on to say that the court would always give considerable weight to the views of the Authority, but those views, however, will never be determinative because if they were the supervisory role of the court would be reduced to formality.

One of the matters of concern, was in ***re Transworld Bank and Trust Limited (in voluntary liquidation).*** It is to be noted that despite Murphy J.'s judgment given on May 20, 1999, he proceeded to appoint Mr. Johnson an official liquidator of the Optimum Fund on November 3, 1999.

Another concern was the ***Uzzell v Uzzell*** case when Sanderson J. gave his judgment on July 5, 2001. Despite his then concerns, Sanderson J. appointed Mr. Johnson as an official liquidator on two subsequent occasions. The records disclose that some eighteen appointments of Mr. Johnson as an official liquidator, were made by the Chief Justice, Graham J., Levers J., Panton J., Sanderson J., Kellock J.(*en banc* ruling) on several occasions

subsequent to the ***Transworld Cook-Bodden*** matters. Appointments were made by the court during the years 2000, 2001, 2002 and 2003.

Mr. Alberga who appeared for the intervenor at the hearing before Henderson J. submitted that the history of appointments outlined above was conclusive of the issue.

This is how Henderson J. dealt with the submission in his reasons for judgment at page 19:-

> "The court files in the other cases mentioned by Mr. Alberga do not reveal any consideration of the issues before me. While Murphy, J. and Sanderson, J. would obviously have had clear recollections of their own prior decisions, it is difficult to say how well informed they would have been on the concerns as a whole. Was Sanderson, J. for example, fully aware of the detailed findings by Murphy, J. in *Transworld* and by Kellock, Ag. J. in *Cook-Bodden*?"

Cayman is a small jurisdiction and has only three judges. Murphy J. certainly would have been aware of his concerns in the ***Transworld*** matter. The ***Cook-Bodden*** case was reported in the Cayman Island Law Reports. Kellock J. who sat in the *en banc* ruling would certainly have been aware of his concerns in the ***Cook-Bodden*** case. Henderson J. stated that the record is silent. In my view it is reasonable to assume that the judges in Cayman are aware of decisions of their brother judges. If the record is silent why is it to be assumed that the judges were not aware of these concerns.

The judges who made the subsequent appointments could not have been sufficiently concerned about the 1999 ***Transworld*** and ***Cook-Bodden*** matters. If they were, they would have refused to make the appointments.

In his conclusions, Henderson J. stated at page 27:-

> "My decision, of course, will appear at odds with decisions of other judges of this court in the recent past. I am not bound to accept their conclusions on the question of past and, in any event, there is no evidence that any judge of this court has given mature consideration to the collection of concerns I have raised."

Where is the evidence that they did not give mature consideration to these concerns? Henderson J. finally determined that his concerns in the *en banc* decision, the ***Banco del Progresso*** liquidation and the ***Uzzell*** case were alleviated by the evidence.

He however, held that the other three – the ***Latin American Bank*** liquidation, the ***Transworld*** liquidation and the ***Cook-Bodden*** case, were more troubling. He continued to have concerns over these three matters.

A number of cases were referred to before us. These dealt primarily with removal of liquidators. There were no cases with respect to the appointment of liquidators. Henderson J. held that in his view, the circumstances in which the court will refuse an initial appointment are

somewhat broader than those in which it will act to remove a liquidator that has already been appointed.

In my view this is incorrect. There is little if any authority on the applicable criteria for appointment by the court. The court, however, must have a discretion to be exercised judicially. There is no authority for the proposition that the discretion is broader for appointment.

As a matter of practice the courts have usually appointed the liquidator proposed by the petitioning creditor. This does not mean that the court is obliged to make such an appointment but it would normally do so subject to the court considering the nominated liquidator to be a fit and proper person.

From a recording of the judge's reasons it appears that he has relied substantially on the past as found by the judges in the matters of concern without any enquiry into those findings of facts.

The criteria for removal of a liquidator was considered in a number of cases.

In ***re Adam Eyton, Limited*** **[1887] 36 Ch D 299,** Cotton L.J. at page 303 refers to the case of ***Sir John Moore Gold Mining Company*** where it is stated by the late Master of the Rolls:-

> "I should say that, as a general rule they point to some unfitness of the person – it may be from

> personal character, or from his connection with other parties, or from circumstances in which he is mixed up – some unfitness in a wide sense of the term."

Colton L.J. then states:

> "He does not intend to exhaust all the grounds, but in my opinion, and I believe the rest of the court agree with me, if the court is satisfied on the evidence before them that it is against the interest of the liquidation, by which I mean all those who are interested in the company being liquidated, that a particular person should be made liquidator, then the court has power to remove the present liquidator, and of course, then to appoint some other person in his place."

In ***Re Keypak Homecare Ltd [1987] 3 BCC 558***, the liquidator was removed because his performance in the conduct of the liquidation was not impressive.

In ***Re Edenote Ltd [1996] 2 BCLC 389,*** Nourse L.J. commented that the court did 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. In my view this would be equally true in relation to a refusal of the court to appoint a liquidator.

In his judgment Nourse L.J. at page 397-398 stated :-

> *Re Keypak Homecare Ltd* was a decision under s 108(2) of the 1986 Act, which provides that the court may 'on cause shown' remove a liquidator in

a voluntary winding up. Although those words do not appear in s 172(2) I agree with Sir John Vinelott that the difference in the language of the two provisions is immaterial for the purposes of this case. Indeed, it is not easy to think of any circumstances in which the court would remove a liquidator without cause being shown. In *Re Keypak Homecare Ltd* Millett J, having referred to three earlier authorities, the last of which was the decision of this court in *Re Adam Eyton Ltd, ex p Charlesworth* (1887) 36 Ch D 299, said ([1987] BCLC 409 at 416):

> 'There were special circumstances in that case, but I do not read the general principle laid down by the Court of Appeal as being limited to cases in which special circumstances can be shown. On the contrary, the words of the statute are very wide and it would be dangerous and wrong for a court to seek to limit or define the kind of cause which is required. Circumstances vary widely, and it may be appropriate to remove a liquidator even though nothing can be said against him, either personally or in his conduct of the particular liquidation.'

I respectfully agree. In that case an order was made for the removal of the liquidator but the facts were very different. Although he was a professional, independent and experienced liquidator, against whom nothing could be said so far as his personal integrity was concerned and there was no evidence of any misconduct or wrongdoing, the judge was not impressed by his performance in the conduct of the liquidation. He took the view that he was unlikely to pursue the directors with anything like sufficient vigour in respect of their having improperly removed the

company's stock and traded with it on their own account before the liquidation.

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 (see [1995] 2 BCLC 248 at 268). Again, I respectfully agree. But there is an important qualification, which is indeed accepted by Mr. Heslop. 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.

In ***Deloitte and Touche A.G. v Johnson another*** **[1999] 1 W.L.R.**

1605, Lord Millet at page 1610 said :-

"The plaintiff has cited numerous authorities on the circumstances in which the English Court will exercise its power to remove a liquidator for cause. Their Lordships do not find them helpful to the plaintiff. They show that impropriety is not necessary; that it is sufficient to satisfy the court that the removal of the liquidator will be for the general advantage of the persons interested in the liquidation; that in the absence of impropriety the court will have regard to the wishes of the majority of those interested; but that where impropriety is shown the court may override their wishes."

In ***A M P Enterprises Ltd v Hoffman and another*** [2003] 1 BCLC 319 in an application for the removal of a liquidator, Neuberger J. at paragraph 2 stated :-

> "The courts power to remove and replace a liquidator is derived from s 108(2) of the Insolvency Act 1986 which is pleasantly short. "The court may on cause shown remove a liquidator and appoint another". As a matter of ordinary principle and statutory interpretation, that seems to me to suggest as follows: (a) The court has a discretion whether or not to remove and replace the liquidator, (b) it will do so on good grounds, (c) it is up to the person seeking the order to establish those grounds, (d) whether good grounds are established will depend on the particular facts of a particular case (e) in general it is inappropriate to lay down what facts will and what facts will not constitute sufficient grounds."

At paragraph 23:-

> "In an application such as this, the court may have to carry out a difficult balancing exercise. On the one hand the court expects any liquidator, whether in a compulsory winding up, or a voluntary winding up, to be efficient and vigorous and unbiased in his conduct of the liquidation, and it should have no hesitation in removing a liquidator if satisfied that he has failed to live up to those standards at least unless it can be reasonably confident that he will live up to those requirements in the future."

From these cases it may be inferred that the factors and considerations for removal are similar to a case of appointment. The court should have regard to the interests of the liquidators as a whole.

The court will have regard to the majority of those interested. The choice of the petitioner is an important consideration. Lack of competence and ability is also a consideration. Is the court reasonably satisfied that the person to be appointed is unfit? Has it been shown that the person does not have the experience to be appointed a liquidator? Has sufficient cause been shown to deny the appointment?

In the case before this court, Henderson J. based his decision on concern in these matters, two of which occurred in 1999. He was as he put it "troubled by these matters." For three years the judges did not seem to be concerned. The intervenor was subsequently appointed as a liquidator time after time. There was no evidence in this case, apart from these concerns, to suggest that the intervenor would not be able to perform the duties of liquidator with integrity and competence.

The intervenor had been appointed since December 2002 to assume control of the Pegasus Insurance Company by the Governor on the recommendation of the Monetary Authority. There is no evidence or suggestion that he has not carried out his duties properly and efficiently.

There is no evidence to suggest that the same concerns expressed in 1999 still existed today. The petitioner was willing to propose the intervenor for appointment despite the concerns of the judge.

In my opinion Henderson J. gave no weight to these subsequent appointments. He ought to have given some weight to them. He also did not give sufficient weight to the views of the petitioner.

It was wrong to deny the intervenor an appointment based on the concerns of other judges in 1999. Concern does not equate with a finding of being unfit. There must be more than concern. The judge must be reasonably satisfied based on evidence that the appointee is unfit for appointment. This is not such a case.

I would allow the appeal on this ground.

There is one other matter raised on the appeal; this is the several communications between Henderson J. and the Chief Justice both prior to and after the hearing. These communications concerned the appointment of Johnson as liquidator. During the hearing a memorandum from the Chief Justice to Henderson J. dated October 16, 2003 was disclosed to counsel.

There were however, a number of memoranda passing between Henderson J. and the Chief Justice prior to October 16, 2003. These were not disclosed to counsel until after the decision of the judge was handed

down. There was also a memorandum from Henderson J. to the Chief Justice after the hearing was completed but before the decision was handed down. This was on January 15, 2004. The hearing was completed on January 8, 2004 and judgment handed down on February 4, 2004. The memorandum also disclosed that there had been discussions between the judges as to the future appointment of Mr. Johnson. The following were the memoranda passing between Henderson J. and the Chief Justice.

(1) memorandum from Henderson J. to the Chief Justice dated May 16, 2003;

(2) memorandum from Henderson J. to the Chief Justice dated May 29, 2003;

(3) memorandum from the Chief Justice to Henderson J. dated June 24, 2003;

(4) memorandum from Henderson J. to the Chief Justice dated July 2, 2003;

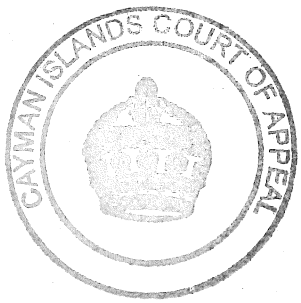
(5) memorandum from Henderson J. to the Chief Justice dated January 15, 2004.

It appears therefore that as from May 16, 2003, the appointment of Johnson as a liquidator was being discussed in memoranda and in discussions with the judges.

It must be conceded that judges do meet from time to time to discuss policy. A judge may even be consulted by another judge on points of law.

The memoranda and discussions by the judges went beyond policy discussions. A particular case was being discussed and what action could be taken in the matter. After the hearing was completed, and before judgment, the judge is still consulting with the Chief Justice as to the merits of submissions made by counsel in the matter. He is asking the Chief Justice to give his opinion on matters which required the judge's own decision. This was not disclosed to counsel until after judgment was delivered. In my view it is undesirable for such a procedure to be adopted.

ZACCA, P.



COLLETT, J.A.

I agree with the judgment and reasons advanced by Mr. Justice Taylor except in respect of the consultations which took place between the learned Judge and the Chief Justice and other Judges of the Grand Court. In that respect I endorse the observations of the learned President.

COLLETT, J.A.

ZACCA, P

Appeal allowed.

Order of trial Judge vacated.

The Intervenor, Christopher Johnson, is hereby appointed as a joint liquidator.

Costs of appeal reserved.

ZACCA, P.