

March 31, 2004
Civil



31/3/04

1 IN CHAMBERS
2
3 IN THE GRAND COURT OF THE CAYMAN ISLANDS
4
5 CAUSE 284 of 1991

Civil

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7 IN THE MATTER OF **BANK OF CREDIT AND COMMERCE INTERNATIONAL**
8 (OVERSEAS) LTD. (IN LIQUIDATION)
9 AND
10 IN THE MATTER OF THE BANKS AND TRUST COMPANIES LAW 1989
11 AND
12 IN THE MATTER OF THE COMPANIES LAW (REVISED)
13
14

15 Appearances:
16 Mr. Nigel Clifford and Mr. Robin McMillan of Hunter and Hunter for the Joint Official
17 Liquidators ("the JOLs") (with them Mr. Michael Pilling and Mr. Stu Sybersma of the
18 Liquidators staff.
19 Mrs. Sheridan Brooks-Hurst for the Consultative Creditors Committee.
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22 Before:
23 Hon. Anthony Smellie
24 Chief Justice

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26 Date: 31st March 2004
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29 RULING
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32 The first of two summonses brought by the JOLs seeks directions as to whether a
33 Liquidation Committee should be established in order, primarily, that that Committee
34 may consider and set the remuneration to be paid to the liquidators in the future of this
35 liquidation. The second summons seeks the Court's approval of certain past fees and
36 expenses. This Court has been primarily responsible since the outset of the liquidation in
37 1991 for setting the liquidators' remuneration and for approving the amount of fees and
38 expenses.

1 However, there is and has been since 1992 a Consultative Creditors Committee (“the
2 COC”) established by directions of this Court. Among other things, the COC has had a
3 role to play in the fixing of remuneration but the COC’s responsibilities for the
4 liquidators’ remuneration are not fully like those of a liquidation committee. The COC
5 acts in an advisory capacity only and so has had its views taken into account by the Court
6 in dealing with applications. By contrast, a liquidation committee, formally established
7 in keeping with the Insolvency Rules, would have the primary legal responsibility for
8 setting rates and for approving amounts of liquidators’ fees. When the liquidators
9 disagree with the Committee so appointed, their right would be one of appeal to this
10 Court.

11 The jurisdiction of the Court to deal with these matters in the first instance, expressed in
12 terms of section 107 (2) of the Companies Law, is now in question as a result of the
13 recent decision of the Court of Appeal in The Matter of the Waterford Insurance Limited
14 et al CICA # 01 and 02-04 of 2003; delivered on 30.4.03. In summary, the decision of
15 the Court of Appeal mandates that the fixing of liquidators’ fee rates and amounts of
16 remuneration, must be referred to a liquidation committee who will have the primary
17 responsibility for setting and approving them, in every case involving a compulsory
18 liquidation.

19 This has led to the issuance of Practice Directions from this Court seeking to give effect
20 to the Court of Appeal’s decision. Thus, among other things, requiring that liquidation
21 committees be established where they do not already exist. As in the present matter, the
22 response to these Directions suggests that there are many practical impediments to the
23 full implementation of them. In many instances, this has been because the identification

1 and organisation of a liquidation committee is not practicable in the absence of a clearly
2 defined body of creditors.

3 In other instances, such as in the present matter, creditors have expressed the wish that
4 the Court deals with the matter of liquidators fees, not themselves being able to assess
5 what are the local market forces which apply.

6 This all suggests that the applicable Law and Practice requires further clarification and
7 consideration is being given to that matter.

8 Mr. Clifford on behalf of the J.O.Ls proposes and Mrs. Brooks-Hurst on behalf of the
9 COC agree, that I should defer the hearing and decision on this first summons for the
10 time being; with liberty to restore. While they both submit that the provisions of the
11 Companies Law clearly authorise and mandate the Court to deal with this matter, they
12 recognise the difficulties which arise as the result of the Court of Appeal's decision. The
13 future fees, costs and expenses in this matter will be dealt with when the matter is
14 restored.

15 Counsel also both agree that I should nonetheless now proceed to deal with the second
16 summons which brings the application for approval of past fees and expenses. This is on
17 the basis, that as those fees and expenses were incurred prior to the Court of Appeal's
18 decision, that decision would not preclude them being dealt with under the regime which
19 previously existed in this liquidation for the setting of the JOLs' fees and expenses.

20 At a meeting of the COC on 18th July 2003, the COC indicated that they were unlikely to
21 approve the fees and expenses of the JOLs, but that they would follow the course
22 previously adopted of leaving the matter to the Court.

1 The past fees and expenses - covering a period of 6 quarters from January 2002 to 15 July
2 2003; are the subject of extensive material filed in support of this summons. It includes
3 the JOLs' Report to the Court dated 31 December 2002, and their report to the COC
4 dated 4 July 2003 as updated by affidavit evidence of Mr. Michael Pilling, one of the
5 JOLs; filed on 11 February 2004.

6 After a full discussion of the jurisdictional issues raised by both summonses (as outlined
7 above) and on the basis of the COC's and the JOLs' agreement that I should proceed to
8 resolve the matter of past fees and expenses incurred prior to the Court of Appeal's
9 decision, I decided to take the application on this summons.

10 This is my decision on it.

11 The amount of fees and expenses involved for the 6 quarters, at some 40 million United
12 States dollars, are huge by any standard. But the sheer quantum is no indication by itself
13 as to reasonableness nor as to whether the fees and expenses were properly incurred.

14 That question involves the application and analysis in the context of this matter, of a
15 number of general principles which are recognised in earlier decisions of this Court on
16 fee approval applications as taken from the Insolvency Rules.

17 These include:

18 (a) The complexity (or otherwise) of the liquidation.

19 This liquidation, though ongoing for some 13 years, continues to be among
20 the most complex ever seen. The level of activity necessarily undertaken by
21 the liquidators and their staff and time spent, though once much higher and
22 though it has tapered off in recent years, has increased once again in response,

1 in particular, to the demands of very involved litigation now underway in
2 England and in the United States. More on this below.

3
4 (b) Any aspects in which, in connection with the winding up, there falls on the
5 insolvency practitioners (as liquidators) any responsibilities of an exceptional
6 kind or degree.

7 The observations here are necessarily related to the observations at (a) above.
8 The material filed in support of this summons shows that the JOLs' personnel
9 and in particular certain members of their staff dedicated to the investigation
10 and management of the complex litigations, have had to work extraordinarily
11 long hours, often away from their homes, overseas.

12 These hours, as Mr. Clifford explained in some detail, have been primarily
13 dedicated to the necessary investigative work which must be undertaken to
14 institute and prosecute complex litigation of the kind involved. A line graph
15 prepared to compare the levels of activity in the four main areas of the BCCI
16 (O) liquidation - "operations", "asset realisation", "creditors claims" and
17 "investigations" - clearly shows the rise in activity since October 2002 in the
18 area of investigations. That line rose from 2000 hours per quarter in October
19 2002 to a high of 7000 hours per quarter in June - July 2003. From that peak,
20 the line has been descending to just about 3000 hours per quarter now,
21 commensurate with the fact that the actions are now instituted before the
22 Courts in England and the United States. Indeed as will be mentioned below,
23 a settlement appears to have been achieved in one of the major actions and is

1 probable in another. By comparison, the other three lines of the graph have
2 more or less remained at constant levels since October 2001.

3 The result also, is that more than one-half the total costs claimed for the 6
4 quarterly periods under review; are legal fees payable to the different firms of
5 lawyers involved in the various actions and other lawyers also involved in
6 ongoing legal work generally in support of the liquidation.

- 7
- 8 (c) The effectiveness with which the insolvency practitioners appear to be
9 carrying out, or to have carried out, their duties as liquidators.

10 Relative to the period under review here, this issue can readily be determined
11 by reference to proven factors; ie: the cumulative realisation of assets
12 compared to the cumulative expenditures; inclusive of the period under
13 review. These figures are approximately \$2.15 billion and \$0.35 billion
14 respectively. Expressed another way, the cumulative expenditure of the
15 liquidation stands at the acceptable rate of 15% of realisations. These and
16 other proven or known factors to be discussed below are presented as
17 testimony to the effectiveness with which the liquidators are conducting this
18 liquidation.

- 19
- 20 (d) The value and the nature of the assets with which the liquidators have to deal.

21 This is another way of measuring the value of the BCCI (O) liquidation
22 estate. The approach to this issue may also be expressed in terms of the
23 value of past and future expected dividends.

1 In this regard, Mr. Clifford submits on behalf of the JOLs, that the reality has
2 exceeded all expectations; with dividends of 75 cents in the dollar already
3 declared and paid. This is to be compared with the gloomier expectations of
4 only 15% in the early days of the BCCI debacle.

5
6 Other known or proven factors

7 The complex and important civil actions now underway in the United States and England
8 promise to realise further significant assets and to yield further dividends. The action in
9 the United States involves a claim against Bank of America in respect of the alleged
10 collusion of its affiliate – Security Pacific International Bank – in illegal transactions
11 orchestrated by the former management of BCCI and which resulted in massive losses to
12 BCCI.

13 The investigations into this matter (involving among other things depositions and
14 discovery applications) have been time-consuming and expensive.

15 However, this expenditure I am told, is likely to bear fruit in the form of a satisfactory
16 settlement of this claim which has been reached.

17 In England there are two actions underway. The first is another against Bank of America
18 in relation to both its divestment from the BCCI group in the late 1970's and early 1980's
19 and its continued correspondent banking relationship with the BCCI Group following the
20 divestment. The equally complex and extensive investigations and preparations for this
21 matter I am told are also likely to bear fruit in the form of a settlement.

22 The other action in England, is brought against the Bank of England in respect of its
23 alleged misfeasance or malfeasance in failing to act against or appropriately disclose

1 irregularities in respect of the operation of BCCI's operations within the United
2 Kingdom; irregularities which are said to have been known to the Bank of England.

3 While regrettably there is no immediate prospect of settling this claim, the BCCI estate
4 has already had significant successes before the Courts in England which confirm the
5 viability of the claim. A great deal of professional costs - liquidators' and legal - have
6 been incurred in pursuing this claim and while the legal costs involved in the three
7 actions have been spread across the global estate; the BCCI (O) estate must shoulder its
8 agreed portion. What is to be recognised now is that as in the case of the settlements, the
9 viability of the claim which has been instituted against the Bank of England, suggests that
10 the associated costs have been reasonably and properly incurred.

11 The legal costs of the three actions, as well as some incurred in other actions mentioned
12 below, represent slightly more than one-half the total of the sum of the present
13 application.

14 The JOLs were further engaged in resisting certain "mega-claims" brought by former
15 BCCI employees by which they claimed some 2.5 billion dollars in relation to the
16 ICIC/BCCI Staff Benefit Funds and Provident Funds. These were funds which had been
17 established for the benefit of staff, but misappropriated by the former management of
18 BCCI.

19 These claims were successfully resisted because the JOLs and their counterparts in
20 England and Luxembourg, felt that they were already provided for under Trust
21 Agreements and settlements made in 1996 and which were ultimately approved by this
22 and the other Courts.

1 Nonetheless, an Employee Settlement Initiative (“ESI”) has been reached. By the E.S.I,
2 major creditors of the liquidation estate will agree to divert up to 1% of certain future
3 dividends to a contribution fund to be used in part to relieve employees of the financial
4 burden of their loans obtained from BCCI.

5 I am told that very significant time, effort and costs were involved in arriving at this
6 settlement and which are also reflected in the quantum of fees and expenses under
7 review.

8 Further expenses incurred in defending “rump creditor” claims brought by creditors of
9 former BCCI branches around the world; can now also be regarded as monies well spent.

10 Included in these, significantly, are the costs of proceedings going all the way to the
11 Privy Council in which the BCCI(O) estate was successful. That action determined the
12 question, relevant to many outstanding claims, whether they were properly to be brought
13 not against the BCCI (O) estate; but against the estates of branches located in countries
14 which were the lex situs of those claims and which branches had ring-fenced around their
15 own assets; opting not to participating in the global pooling arrangements. (See Wight,
16 Pilling and Mackey v Eckhardt Marine G.m.b.H. 2003 CILR 211. P.C).

17 While the foregoing describes the most complex and significant areas of litigation, there
18 have been several other issues, some involving or potentially involving litigation on an
19 international scale and which have been extant for years. For example, these include the
20 claims against Pharoan/Attock, Shiekh Kalill, claims relating to the collapse of the Gokal
21 Group and claims against S.M. Akbar.

22 The point of all the foregoing, is that the quantum of fees and expenses under review
23 reflect the JOLs’ involvement on many different fronts; either as a matter of their own

1 efforts or that combined with the efforts of their U.K. counterparts, as well as lawyers in
2 the U.K, Luxembourg, the United States, here and in several other jurisdictions on behalf
3 of the JOLs.

4

5 The concerns of the COC

6 It is first of all appropriate to record that the COC do not take issue with the quantum of
7 hours charged by the JOLs or their staff. Nor do they seek to deny the value of the work
8 undertaken or results achieved.

9 The COC's concern is instead three-fold: first as to the hourly charge out rates; secondly,
10 as to the use of the JOLs' own staff who are charged out at higher rates, instead of the
11 engagement where possible, of staff at lower cost by the estate itself, dedicated to work
12 on the liquidation; and thirdly; allied to the second, is the COC's concern at the
13 questionably high rates at which staff in the "Other Category" ie: non-professional staff -
14 are being charged out to the estate by the JOLs.

15 These three issues have prevented the fees and costs for the quarters under consideration
16 being agreed by the COC.

17 As to the first issue; I made it clear at the outset that I consider it inappropriate at this
18 stage to reduce the hourly charge out rates of the liquidators and their professional staff.

19 These rates were last reviewed in 2001. They were then considered as against those last
20 set before then in 1998. It was considered that the adjustment in 1998 had been intended
21 to take account of inflation and that the rate remained reasonable in 2001. Now, three
22 years later, it would to my mind be unreasonable to impose a reduction of those rates.

23 While in 1998 and 2001 the rates were respectively described by this Court as being

1 among the highest allowed in this jurisdiction, they were nonetheless justified, having
2 regard to factors then identified, including especially, the complex and global nature of
3 this liquidation. With the passage of time and in today's market with the impact of
4 inflation, these rates are less than some others now being charged.

5 While this Court remains duty bound to consider the reasonableness of those higher rates
6 themselves, they do form part of the context in which the BCCI rates in issue must be
7 considered. In other words, the trend does not justify the proposed reduction.

8 A further consideration is the continuing application here of the volume discount of 5%
9 applicable to the JOLs' fees. By virtue of that discount, the actual hourly charge out rate
10 is reduced by 5% and so, in actuality, less than the rates set in 2001.

11 For all those reasons I may not now properly impose a reduction in the hourly charge out
12 rates applicable to this estate.

13 As to the first staffing issue; the JOLs' response is in effect that they have had no choice
14 but to deploy staff in the way they do. In point of fact, they say that the very members of
15 staff named by the COC as persons to be offered direct employment with the liquidation
16 estate instead of being charged at higher rates as members of the JOLs' staff, are those
17 involved in the preparatory and investigatory work required by the Court actions
18 discussed above. They say that the volume and cost of the work they do cannot be
19 avoided, yet it is the resultant costs of that work which the COC would wish to see
20 reduced by them becoming employed directly to the estate.

21 Further in response, the JOLs say that a decision such as to what is the suitable
22 deployment of staff and at what cost, must be a matter for their own professional
23 judgment.

1 Still further, that in their judgment, it is of crucial importance to assign the particular
2 members of staff to the particular assignments involved. And these are people who
3 happen to be members of the JOLs' professional staff who prefer, in any event, to remain
4 in that capacity.

5 While I feel obliged in the present circumstances to accept this position taken by the
6 JOLs, I must register the following general concerns.

7 No arrangement by which liquidators would take undue advantage of their offices by
8 seeking to prefer their own interests over those of their liquidation estate is permissible.

9 This would include charging out their own staff at higher rates than could reasonably be
10 obtained by other arrangements; such as by engaging the same level of staff as employees
11 of the estate. Charging out their own staff to their estates at rates unreasonably higher
12 than would normally be charged out, would also be an abuse of the office.

13 Liquidators seeking to profit in such ways placing themselves in a conflict of interest and
14 in breach of faith could not and would not be sanctioned by this Court. It must never be
15 forgotten that liquidators owe fiduciary duties to those having an interest in their estates.

16 The relevant consideration therefore, is not only whether the liquidator as a fiduciary in
17 fact deals properly with the assets of his estate's; but whether by taking advantage of any
18 opportunity the fiduciary would be putting himself in a "position where his interests and
19 duties conflict" (Bray v Ford [1986] A.C. 44 at page 51 per Lord Herschell. This
20 includes not just actual conflict, but also circumstances in which "the reasonable man
21 looking at the relevant facts and circumstances of the particular case would think that
22 there was a real sensible possibility of conflict" (Boardman v Phipps [1967] 2. A.C. 46at
23 p.124 per Lord Upjohn).

1 There is, I must immediately note however, no evidence or suggestion of such a conflict
2 arising here in relation to the rates for JOLs' professional staff.

3 Their charge out rates have been set by the Court from the inception in 1991 and up dated
4 to meet inflation as explained above.

5 In the absence of any evidence to the contrary, I feel obliged to accept that the
6 deployment of staff; in particular the members of staff deployed for the various court
7 actions, is and has been proper and necessary.

8 But allied to this concern, is the third question which the COC continue to raise over the
9 JOL's practice of charging separately for the time of "other staff". This is the category of
10 non-professional staff whom one might ordinarily expect, would be covered by the fees
11 charged for the professional staff whom they assist and support.

12 That this is a reasonable expectation is borne out by, for instance, Appendix 6B to
13 Exhibit 9 to Mr. Pullings' affidavit filed in support. In that document, the JOL's fees are
14 compared by reference to the jurisdictions in which they are incurred. This shows that
15 only in Cayman are the JOL's in the practice of charging out separately for "other staff".

16 Thus, for one of the quarters under review (1st October- 31st December 2002); 2012 hours
17 were charged out at a cost of \$272 073 for that category of staff. This, significant for
18 present purposes, is at a charge out rate of USD 135 per hour.

19 In response to the COC's concern, the JOL's argue that this issue, like the issue of their
20 own professional charge out rates, was settled by this Court in 2001 and should not be
21 revisited now.

22 In this regard, I quote from the ruling given in this Cause on 28th June 2001 (unreported,
23 at page 3):

1 “Mrs. Brooks-Hurst also referred to the charges made to the estate by the
2 Liquidators under the head the “Other Category” of personnel. I am informed that
3 this head charges for the time of the non-professional staff engaged by the
4 Liquidators.

5 It is a head of charge often subsumed within the fees charged by liquidators
6 themselves in other liquidations and treated as a part of the costs of the delivery of
7 their own services. As it has been allowed in the past as a proper head of fees for
8 this liquidation, it would be inappropriate to disallow it now. I nonetheless take it
9 into account in arriving at the view I take of the reasonableness of this application
10 for an increase of fees”.

11
12 I regard that passage as recognising and as approved by this Court, the practice of
13 charging out for the “other category” of staff. I do not regard it as once and for all having
14 approved the rates of charge.

15 I am indeed concerned, as are the members of the COC, about the rates at which auxiliary
16 or non-professional staff are charged out. It was suggested at that hearing in 2001 (see
17 page 4 of the ruling) that that rate has been as high as USD 168 per hour.

18 I do not see how so high a rate can be justified for non-professional staff. Indeed it was
19 higher than the rate, at USD 165 per hour, then reported in 2001, for senior accountants.

20 At page 210 of Exhibit 10 to the first affidavit of Ian Wight filed in support of the first
21 summons on this application, some comparables are given.

22 They show that in 1993 three of the five leading accountancy firms were charging out for
23 this “other category” of staff, but at significantly lower rates; ie: CI\$70 (USD 84); CI\$55
24 (USD 66) and CI\$55 (USD 66) for an average of CI\$ 60 (USD 72) per hour.

25 Rates of USD135 – USD168 per hour for that same category of staff cannot now be
26 justified, even if the same rate of increase of approximately 30% which has accrued since
27 then on professional fees is applied.

1 I note that the Court of Appeal in the Waterford matter (Supra at p. 22) accepted that
2 liquidators are allowed per the Insolvency Rules, to charge separate fees for work done
3 by their non-professional staff in a winding up. That happily is not at variance with the
4 decision of June 2001 in this matter.

5 I would therefore only add that where that can appropriately be done, it must be at rates
6 which realistically reflect the true costs to the liquidators and, even if some uplift is to be
7 justified, it cannot be unduly higher than those true costs.

8 For the “other category”, the charge out rates which I approve for the period under review
9 is USD92 per hour; (ie:USD72 - the 1993 average rate- plus 30%). This is a rate which,
10 given the typical nature of the work done by this category of staff and their qualifications,
11 I believe reflects a premium in any event.

12 For all the foregoing reasons, I approve the fees and expenses of the JOL’s for the period
13 under review in the amounts set out below, but subject to the 5% volume discount and the
14 discounts to be calculated as a result of the maximum charge out rates set above for the
15 “other category” of staff:

	US\$
16th January 2002 to 15th April 2002	
Deloitte Cayman Liquidators’ fees and expenses	2, 283, 537
Deloitte UK liquidators’ fees and expenses	1, 162, 677
Legal and other fees	2, 821, 558
	<u>6, 267, 772</u>
16th April 2002 to 15th July 2002	
Deloitte Cayman Liquidators’ fees and expenses	2, 539, 484
Deloitte UK Liquidators’ fees and expenses	1, 078, 211
Legal and other fees	3, 427, 029
	<u>7, 044, 724</u>
16th July 2002 to 15th October 2002	

1	Deloitte Cayman Liquidators' fees and expenses	2, 299, 169
2	Deloitte UK Liquidators' fees and expenses	947, 243
3	Legal and other fees	2, 902, 696
4		<u>6, 149, 108</u>

5
6 **16th October 2002 to 15th January 2003**

7	Deloitte Cayman Liquidators' fees and expenses	2, 123, 169
8	Deloitte UK liquidators' fees and expenses	994, 098
9	Legal fees	<u>3, 334, 292</u>
10		6, 451, 559

11
12 **16th January 2003 to 15th April 2003**

13	Deloitte Cayman Liquidators' fees and expenses	2, 299, 839
14	Deloitte UK Liquidators' fees and expenses	1, 215, 445
15	Legal and other fees	<u>3, 208, 431</u>
16		6, 723, 715

17
18 **16th April 2003 to 15th July 2003**

19	Deloitte Cayman Liquidators' fees and expenses	2, 693, 792
20	Deloitte UK Liquidators' fees and expenses	1, 181, 177
21	Legal fees	<u>3, 393, 994</u>
22		7, 268, 963

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28 *[Handwritten Signature]*
29 Hon. Anthony Smellie
30 Chief Justice



31 Dated the 31st March 2004
32 Delivered April 2004
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