4/2/2004

IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO: 488 of 2003

IN THE MATTER OF THE COMPANIES LAW (2003 REVISION)

AND IN THE MATTER OF THE INSURANCE LAW (2001 REVISION)

AND IN THE MATTER OF PEGASUS INSURANCE COMPANY

Appearances:

Mr. Langston Sibblies and Ms. Simone Tomkins for Cayman Islands Monetary Authority
Mr. Ramon Alberga Q.C. and Mr. Charles Quin of Quin & Hampson for Christopher Johnson

Heard:

September 5, 2003
October 15, 2003
December 11, 2003
January 8, 2004

JUDGEMENT

Henderson J.

Decision

On December 13 2002, the Governor in Council, upon the recommendation of the Cayman Islands Monetary Authority ("The Authority"), appointed Christopher Johnson and Nicholas Freeland of PriceWaterhouseCoopers to assume control of Pegasus Insurance Company under Section 11 (1) (vii) of the *Insurance Law (2001Revision)*. The Company is insolvent, in default of its net worth requirements, and has no officers or directors. It has failed to maintain proper books of account. Mssrs. Johnson and Freeland have recommended that it be wound up.

The Authority now petitions for an order under Section 94 of the *Companies Law (2003 Revision)* for a winding up and for the appointment of Mssrs. Johnson and Freeland as joint official liquidators of the company.

When the application for the appointment of Mssrs. Johnson and Freeland came before me for the first time on September 5, 2003, I advised counsel in my chambers that I had concerns about the fitness of Mr. Johnson to be appointed a joint official liquidator. I identified the following five matters which, collectively, have given rise to these concerns:

1) In *Re Transworld Bank and Trust Limited (in voluntary liquidation), cause 281/97* ("the Transworld liquidation");
2) *Johnson vs. Cook-Bodden 1995 CILR 399* ("the Cook-Bodden case");
3) *Re Liberty Capital Limited and others 2002 CILR 606*, ("the en banc decision");
4) *Uzzell vs. Uzzell, cause D97/97* ("the Uzzell case");
5) In *Re Banco Progresso Ltd.*, and *Re Banco de Prestamos Ltd.* causes 655/02 and 657/00 ("the Banco del Progresso liquidation").

To avoid delay in the liquidation, I told counsel that I would appoint Mr. Freeland as sole liquidator while the hearing progressed, but counsel advised that two joint liquidators were desired.

Mr. Johnson retained counsel independent of the Authority and requested and was granted standing in the proceedings so that he could make a full response. The Authority did not take any active role, being content to allow Mr. Johnson to carry the matter forward.

During the course of the hearing a sixth cause for concern, *In Re Latin American Bank, Cause C651/97* ("the Latin American Bank Liquidation"), was presented to Mr. Johnson's counsel for a response.

The Transworld Liquidation

Mr. Johnson and Mr. Robert Jenkinson, his partner at what was then Coopers & Lybrand in the Cayman Islands, were joint liquidators of Transworld Bank and Trust Limited. After a lengthy hearing, Murphy J. of this court gave reason for judgement on May 20, 1999 which ordered the removal of Mssrs. Johnson and Jenkinson from their position.

Mssrs. Johnson and Jenkinson had been appointed by the former management of the company. Coopers and Lybrand had been auditors of the company and Mr. Jenkinson had been the senior auditor.

Mr. Justice Murphy concluded, after extensive argument on the question, that Transworld was insolvent, had been insolvent at all material times, and had no prospect of becoming solvent. As a result, having regard to the Guide to Professional Ethics dealing with insolvency practice found in the Members Handbook of the Institute of Chartered

Accountants (paragraph 7.0), Murphy, J. found that Mssrs. Johnson and Jenkinson "ought not to have accepted the appointment." He added:

"in any case, [they] should have resigned subsequently once they had cause to doubt Transworld's solvency as they clearly did in 1997…".

In the course of his extensive reasons for judgement, Mr. Justice Murphy made a number of findings of fact which have contributed to my concerns on the present application. The following are representative:

> "in affidavits and written and oral submissions, J. and J. [ie. Mssrs. Johnson and Jenkinson] and their advisors have been aggressively adversarial with respect to all issues. I confess to being greatly startled by the aggressive stance of these officers of the court." (page 58)

> " The facts that J. and J. are far more bullish on cause no. 344 of 1996 now, in the context of a removal application, than they seemed to be two years ago, and that they maintain a drastically different view of its commercial viability than do the majority creditors with the most to gain, leaves me with considerable unease as to the extent of their independence from former management." (page 58)

> "There is no indication that J. and J. have proceeded with any investigations of the activities of former management." (page 60)

> "J. and J. themselves implicitly recognize the need at least to consider investigating the activities of TW's former management." (page 62)

> "However I have seen enough of the documentation in this case to conclude, as would anyone with a modicum of commercial experience and sense, that there are transactions which, given their nature and timing, warrant investigation at least." (page 63)

> "There is no indication that J. and J. have the ability or inclination to investigate the actions of former management." (page 63)

"J. and J.'s aggressive posture on the merits of proceeding with cause no. 344 of 1996, particularly in view of their earlier doubts, gives me serious concerns about their judgement and objectivity. Their alignment with former management, the only proponents of that litigation, gives me additional concerns." (page 64)

" I have been disturbed by the finger pointing and animosity reflected in the affidavit material. It goes far beyond what is necessary to present the respective cases on the facts and the law, and it is not at all what I would expect from officers of this court, liquidators or attorneys." (page 64)

"The result of all of this now seems to be complete intransigence on J. and J.s part – an unwillingness to recognize that there could be any basis whatsoever for the majority creditors concerns." (page 65)

"J. and J. are clinging unreasonably to the viability of cause no. 344 of 1996 as the raison d'etre of their continued existence as liquidators. Clearly nothing else is happening in this liquidation save for J. and J.'s efforts to justify their position and deflect criticism." (page 65)

Murphy, J. said he had " no hesitation" in removing J. and J. as liquidators (page 74) and considered it a "clear case" (page 75). He said they should have resigned "months ago." The application should not have been necessary.

Murphy, J. gave six reasons for the removal and said that each item (with the possible exception of the fifth) would constitute sufficient cause by itself. His reasons were:

1) Their disregard for the wishes of 90% of the admitted creditors, particularly with respect to the commercial viability of cause no. 344 of 1996;
2) Their apparent identification with, and support for the views of, former management;
3) The fact that they were the auditors of T.W., which is insolvent;

4) Their inability or unwillingness to consider investigation of former management;
5) Their inability or unwillingness to consider a global approach to the liquidation of all B.E. related entities; and
6) Their intransigence and lack of objectivity generally.

Despite his criticisms, Mr. Justice Murphy noted that he was not attributing any "bad faith" to Mssrs. Johnson and Jenkinson (page 66).

The Cook-Bodden case

Some seven weeks after the decision in Transworld, Kellock, Ag. J. of this court gave judgement in the Cook-Bodden case. Mr. Johnson applied to set aside a certain transfer of land by the first defendant to the second and third defendants on the ground that it was a fraudulent disposition. Mr. Johnson had earlier obtained default judgement against the first defendant for some $200,000. In the result, he succeeded in setting aside the transfer of land.

Mr. Johnson had sworn an affidavit at an earlier stage of the case and then gave oral evidence at trial. In assessing Mr. Johnson's credibility, Kellock, Ag. J. contrasted the affidavit evidence with that given from the witness stand. The following quotations are illustrative of his findings of fact:

"In my view, Johnson's affidavit evidence of June 1997 is much closer to the truth than his evidence at trial. At trial the agreement (as Johnson described it) was a handshake arrangement inviting the conclusion that he loaned Cook-Bodden almost $200,000 because of his feelings towards his late mother. (Ethel Cook-Bodden passed away in 1993.) In other words, Johnson's loans to Cook-Bodden were motivated by charity. However, on cross-examination at trial, Johnson testified that from the outset he intended to bill the Eden Estate for professional services which were to be performed on his own time for his own account and not on behalf of his firm or his firm's account. Johnson testified that this decision was made, as he was lending Cook-Bodden money, he was concerned that there was a conflict, making it inappropriate for his firm (Coopers & Lybrand) to bill the Eden Estate. I asked him how this conflict would be avoided by undertaking this work as a personal rather than a firm engagement. His answer was that that was the decision he made at the time. I concluded at the time that this response was evasive and I continue to hold that opinion. The fact that Johnson had decided to treat the work on behalf of the Eden Estate as a personal engagement may account for the lack of correspondence.

When asked whether Coopers & Lybrand had authorized this personal engagement, Johnson said that he had consulted another partner at the firm in Grand Cayman who had approved of it. That may be so. However, I very much doubt that the executive committee of Coopers & Lybrand would expect their partners to have professional practices "on the side." In addition, while I can appreciate that it would be undesirable for a professional advisor to an administrator of an estate to have a personal business relationship with that administrator, I cannot understand how the arrangement Johnson said he made with Cook-Bodden could avoid the problem or why Johnson thought that it would. Johnson did not attempt any explanation and I therefore conclude that Johnson was less than frank with the court.

I think that it is much more likely that Johnson's arrangements with Cook-Bodden were a product of the desire to become an advisor to the administrator of a large and complex estate, the administration of which had been going for a substantial period of time and was likely to continue well into the future. Johnson could therefore anticipate that the accounting and financial advice fees, payable by the estate, might over time be substantial. This to me is a more credible explanation for the "handshake" arrangement and is confirmed by the statement in the affidavit of June 1997 to the effect that Johnson did not become concerned about the repayment of his loans until the end of May 1997, when he learned that Cook-Bodden had been replaced as the administrator of the estate. I will return to that statement, which in my view was also less that frank but reinforces the conclusion that Johnson expected to be repaid from funds generated by the administration of the estate." (pages 417-418)

> "In the light of this evidence, I am not prepared to believe that Johnson waited until May of 1997 when Cook-Bodden's removal actually occurred, to become 'alarmed'." (page 421) [Mr. Johnson testified under oath that he did not become alarmed until May, 1997.]

> "Having observed both Johnson and Cook-Bodden in the witness box, I have to say that I cannot rely on the testimony of either. I find some important aspects of the evidence given by both of those gentlemen incredible. Johnson gave me the impression that his viva voce evidence at trial was being "tailored" to avoid the pitfalls created by the champerty and maintenance defense, although I am bound to say that Johnson's view of the law in that area is probably quite different to my own. Be that as it may, it was clear to me that Johnson was determined in his evidence to give maintenance and champerty as wide a berth as possible." (page 431)

Although Mr. Johnson was successful in his claim, Mr. Justice Kellock took the relatively unusual step of denying him his costs. He said:

> "I have given a good deal of thought to the question of costs which would usually follow the event. However, I have decided that, as the plaintiff's testimony at trial was less that frank, the usual order should not be made and, accordingly I will make no order as to costs." (pages 435-436)

The En Banc Decision

In the en banc decision of this court in *Re Liberty Capital Limited and others 2002* CILR 606, the court (at paragraph 28) identified five cases in which Mr. Johnson was asked to seek and obtain approval of creditors committees regarding his proposed fees. We noted that Mr. Johnson had not submitted accounts to the relevant creditors' committees for approval, that the material provided little justification for the fees, and that Mr. Johnson neither returned to court for subsequent approval nor offered an explanation as to why he had not done so. We referred to written rulings delivered in *In re Johnson* on December

19, 1996 and March 17, 1997 (this decision was set aside by the Court of Appeal without reference to this specific complaint on August 1, 2003.)

The Uzzell Case

In the Uzzell decision, Sanderson, J. of this court used strong language in rejecting expert evidence given by Mr. Johnson. He noted Mr. Johnson's adversarial role and improper expressions of opinion on the credibility of others. He said his final report went beyond what an impartial or neutral expert would normally be expected to provide. Sanderson, J. characterized Mr. Johnson's conduct in that case as "confrontational and inflammatory" (see especially page 16 of the judgement).

The Banco del Progresso Liquidation

Sanderson, J. was asked to appoint Mr. Johnson as one of two official liquidators. In argument, he was told that Mr. Johnson "would be financially liable for any negligence or other misdeeds of" the other nominated liquidator who was resident offshore. His decision was given December 11, 2002. Sanderson, J. said he required affidavit evidence either from Mr. Johnson and the other nominee, or from an authorized deponent from PriceWaterhouseCoopers. The requested affidavit evidence was never filed.

The Latin American Bank Liquidation

Mr. Johnson has been acting as the liquidator of Latin American Bank. On June 6, 2003, the Chief Justice directed counsel to obtain answers from Mr. Johnson to the following questions:

1) What is the position of the shareholders? Why no notice to them? Court being asked to prove the abandonment of assets (real estate in Costa Rica) which may belong to them as the claims of creditors have been satisfied in full (except for one category of bond holder whose claims Ms. Corbett says have been settled by compromise); concerned that they be notified.
2) Why does not the report explain how creditors have been treated?
3) What are the total costs of the liquidation to date, including liquidators' costs and fees?
4) Why are there long gaps of time in the conduct of this liquidation which ran for twenty-six years unexplained? (bench notes of the Chief Justice)

On December 12, 2003 the matter came again before the Chief Justice. In the course of making the requested order, Smellie, C.J., expressed some dissatisfaction in these terms:

> "The chronology and history of this matter having been more fully explained, I am now able to accept the basis upon which the application is put for the sanction of the court of the conduct of the liquidation and to order that the company be dissolved.
>
> That however, is not the same thing as a finding or acceptance that the liquidation has in all respects been dealt with satisfactorily.

Unfortunately, given the length of time since May 1991 when the court was last involved, and notwithstanding the explanations which have been offered about the delays; I still feel compelled to note that that gap in time of some twelve years before this matter was again brought before the court, even if only for its update and overall supervision; was extraordinary and unsatisfactory." (Chief Justice's Minute of Order, page 1)

"In this matter, during the twelve year gap already mentioned, a simple occasional letter to the court to explain the reasons for the apparent lack of progress would have gone a long way to allaying any misgiving which could arise." (Chief Justice's Minute of Order page 2)

"As to the shareholders who had not been notified of these proceedings; I accept Mr. Johnson's explanation that as their proven fraud was the reason for the bank's liquidation, they might not share in any excess of assets over liabilities in any event. They were imprisoned for fraud and I am told the liquidator knows nothing of their whereabouts.

From all the foregoing, I am able to record that I see no real basis now for any misgivings in light of the explanations which have been offered, apart from the very fact of the delay in and of itself, about which I remain concerned." (Chief Justice's Minute of Order, page 2)

Mr. Johnson's Response

Mr. Johnson took the position, in his affidavit evidence and in argument, that Murphy, J. had no intention of criticizing Mr. Johnson personally and no cause to do so. At the beginning of his judgement, Mr. Justice Murphy refers to the two joint liquidators as "J. and J." His many criticisms are expressed as applying equally to both.

Mr. Johnson explains that his then partner, Mr. Jenkinson, acted as the lead liquidator because "he was more aware of Transworld's affairs having been the partner in charge of earlier audits." Mr. Jenkinson docketed 425.5 hours on the file; during the same period of time, Mr. Johnson docketed only 38.45 hours. He also noted that he swore only one

affidavit in the case and did not attend the hearing. He said that the liquidators had received consistent advice from their attorneys that there was no reason for them to resign and no proper ground for their removal. In his second affidavit, Mr. Johnson doubted whether the firm which was advancing funds to cover liquidation expenses would have been willing to finance any investigation into the conduct of former management as contemplated by Murphy, J.

Mr. Johnson concluded (first affidavit, paragraph 17) that my statement identifying my concerns on September 5, 2003 was "both inaccurate and unfair in suggesting that I am somehow personally at fault for the conduct of the Transworld Liquidation…".

With respect to the judgement of Kellock, Ag. J. in Cook-Bodden, Mr. Johnson accepted that he may have made an error in judgement in agreeing to act in his personal capacity for Mr. Cook-Bodden. He said:

> "I should also make it clear that I do not, in any event, accept the conclusion…that Kellock J. did not believe my evidence under oath. It is not clear to me, or my advisors, what part of my evidence is said to be disbelieved." (first affidavit, paragraph 22).

In his second affidavit, Mr. Johnson reiterated this position:

> "I do not accept that Kellock J., disbelieved me on oath. The expression he used, on two occasions, was that my evidence was 'less than frank'. (I am aware that holding (7) in the headnote uses the expression 'economical with the truth' but those are the reporter's words not Kellock J.'s.) I do not accept that either. It may be that, at times, my evidence was confused or subject to faulty recollection but I am not a liar whether under oath or otherwise. If, contrary to my understanding and that of my advisors, Kellock J. did disbelieve me, he was wrong to do so."

In reference to the complaint expressed in the court's en banc ruling, Mr. Johnson pointed out that neither the ruling of December 19, 1996 nor that of March 17, 1997 contained any express requirement for Mr. Johnson to return to court for approval of his fees. In four of the five cases, the liquidators' fees were approved by the creditors or attorneys acting on their behalf; in the fifth, the company was solvent and an attorney representing the majority of the shareholders approved the fees. He assures the court that he was unaware of any expectation on the part of the Chief Justice that Mr. Johnson would report these approvals to the court.

With respect to Uzzell, Mr. Johnson has produced letters from two attorneys involved in the case expressing surprise at Sanderson, J.'s remarks and asserting that, from their vantage point, Mr. Johnson gave evidence in a conventional and professional manner.

Mr. Johnson explains (first affidavit, paragraph 39) that "neither I nor my firm were prepared to comply with [the] requirements" which Sanderson, J. identified in the Banco del Progresso liquidation. He says that a fair reading of Sanderson, J.'s ruling does not lead one to conclude that he was ordering anything to be done. Rather, Sanderson, J. was saying that he would not appoint the other joint liquidator until one or other of his requirements had been satisfied. Instead of pursuing the question, the petitioner decided to nominate Mr. Johnson and his partner, Mr. Freeland, in substitution for the offshore liquidator. They were appointed in July, 2003, after which there was no need to address Sanderson, J.'s requirement.

The concern of the Chief Justice in the Latin American Bank case was about delay. Mr. Johnson (second affidavit, paragraph 6) regretted the delay and explained that he had been absent from the Cayman Islands on a number of occasions during the relevant period and said that, during those times when he was here, his attorney was not necessarily available. In the result, the questions were answered, albeit with a delay of about six months.

The Law

Section three of the *Monetary Authority Law (2003 Revision)* provides guidance to the Authority in making its own appointments. It says:

> "In determining for the purposes of this law whether a person is a fit and proper person, regard shall be had to all the circumstances, including that person's –
>
> (a) honesty, integrity and reputation;
>
> (b) competence and capability;
>
> (c) financial soundness."

Section three of the *Banks and Trust Companies Law (2003 Revision)* is in identical terms. Mr. Johnson's competence, capability, and financial soundness are not in issue.

The court will always give considerable weight to the views of the Authority. Those views, however, will never be determinative. If they were, the supervisory role of the court would be reduced to mere formality.

It is entirely unsurprising that the case authorities contain little commentary on fitness for the post of an official liquidator. The criteria are really self evident, and suggest themselves naturally from a consideration of his duties.

An official liquidators is an officer of the court. He acts to safeguard the interests of the creditors or the shareholders. He is entrusted with very considerable powers which he must use wisely and fairly, in pursuit of their interests. The court exercises supervisory jurisdiction over its appointee, resolving some controversial questions and providing occasional guidance.

An official liquidator is expected to report on his activities from time to time, but the reports are not under oath; as an officer of the court, he is trusted to make full and accurate disclosure of all material facts. Liquidators often apply to the court for directions; such applications are typically made *ex parte*. It is vital that the court have confidence that all material facts are put before it and all significant issues and arguments are identified.

In my view, "fitness" to act as an officer of the court is an attribute that neither can nor should be defined exhaustively. 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.

Some assistance can be gleaned from cases involving the removal of official liquidators, although it would not be right to suggest that the question of removal must be considered on exactly the same footing as fitness for an initial appointment. As Nourse, L.J. said in *Re Edennote Ltd. [1996] 2 BCLC 389 (Court of Appeal. Civil Division),* "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" (at page 398).

On the other hand, no one has a vested right to an initial appointment as an official liquidator. In my 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 it has already appointed.

In *Re Keypak Homecare Ltd. (1987) 3 BCC 558*, Millett, J. concluded that a liquidator could be removed by the court even though no personal misconduct or unfitness could be demonstrated. His review of the authorities included this passage:

> "The section authorizes the court to remove the liquidator " upon cause shown". That is not the same as saying "if the court shall think fit". There is a burden upon the applicant to show cause why the liquidator should be removed. Three authorities are relevant. *In Re Marseilles Extension Railway and Land Co.* (1867) L.R. 4 EQ. 692, at p. 694, *Malins* V.-C., made it clear that he did not regard the words "due cause" as requiring anything amounting to misconduct or personal unfitness. He thought that it was sufficient if it could be shown that it was on the whole desirable that the liquidator should be removed. He took into account the

fact that it was a serious and valid objection to the liquidator's efficiency that a considerable number of the creditors were opposed to his continuance in office.

In Re Sir John Moore Gold Mining Co. (1879) 12 Ch. D. 325, the Court of Appeal dismissed an appeal from Bacon, V.-C., who had removed the liquidator. In the course of their judgements, Sir George Jessel M.R. said (at p. 331):

> "I should say that as general rule, the words "on due cause shown" 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."

In fact, the court went on to find that there was such unfitness in the wide sense of the term and removed the liquidator, so that it may be that the words are, strictly speaking, obiter.

At all events, in *Re Adam Eyton Ltd.* (1887) 36 Ch. D. 299, the Court of Appeal considered the language of Sir George Jessel and made it clear it is not necessary in order to justify the court under the section in removing the liquidator that there should be anything against the individual. Cotton L.J. said (at p. 303):

> "In my opinion, although of course unfitness discovered in a particular person would be a ground for removing him, yet the power of removal is not confined to that, and I do not think that the late Master of the Rolls in the case of *In re Sir John Moore Gold Mining Company* (1879) 12 Ch. D. 325 (at p. 331), which has been cited, intended to give an exhaustive definition."

Bowen L.J. agreed that the liquidator should be removed although he said that in the particular case the liquidator whose removal was effected (at p. 305):

> "may consider that the judgement of this Court is not based in any way on the possibility of any reflection upon himself, either in his conduct in this matter or in his general fitness to be liquidator of any honourable company in the kingdom…his character is clear."

It was submitted to me that the rule laid down in that last case, that in order to effect the removal of the liquidator the court needs only to be satisfied that it is for the general advantage of those interested in the assets of the company that the liquidator be removed, must be read in the context of the facts of the case and that very special circumstances must exist before the power can be exercised in a case in which no personal misconduct or unfitness can be shown on the part of the liquidator.

> 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.

These principles were adopted and approved by the Cayman Islands Court of Appeal in *Johnson and Dinan vs. Deloitte and Touch AG [1997] CILR 120* and by Murphy, J. in the Transworld decision discussed earlier. A liquidator may be removed from office even if there is nothing "amounting to misconduct or personal unfitness" (*In Re Marseilles Extension Railway, supra*) and it is not necessary to justify removal that "there should be anything against the individual" (*Re Adam Eyton, Ltd., supra*). The discretion of the court is broad, and a showing of unfitness is not a necessary requirement: see Transworld, *supra*, at pages 53-54.

These observations apply with even more force to the question of fitness for an appointment. The court has a broad discretion as to who should be appointed. There is no need for any showing of a specific act of misconduct to justify a refusal to appoint.

Prior Appointments of Mr. Johnson

Mr. Johnson is a liquidator of considerable experience who has been appointed to that position a number of times by this court. Mr. Alberga argues that I must infer from the nature and timing of some of these appointments that the concerns I have identified have not troubled other judges of this court.

Murphy J.'s judgement in Transworld was given on May 20, 1999; on November 3, 1999, without referring to his prior decision, he appointed Mr. Johnson an official liquidator of the Optimum Fund. Mr. Justice Murphy rejected certain objections that were raised concerning Mr. Johnson's performance as a provisional liquidator of the same Fund but did not engage in any broader discussion on the question of fitness for appointment.

Mr. Justice Sanderson gave his judgement in Uzzell on July 5, 2001; subsequently, he appointed Mr. Johnson in the winding up of Velox Retail Holdings and Velox Investments Co.; and in the winding up of Waterford Insurance Co. The Chief Justice and Graham, J., as well as Levers, Ag. J. (as she then was), and Panton, Ag. J., have also made similar appointments.

Mr. Alberga argues that this history is virtually conclusive of the issue. It shows, he says, that the concerns I have expressed have not troubled the other judges of this court and I should be guided by that.

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? The record is silent.

In any event, fitness for appointment is pre-eminently a question of fact and must be decided anew each time an appointment is made. Clearly, I am not bound to follow decisions of other judges of this court on a pure question of fact. Their decisions would be highly persuasive if, but only if, I could have confidence that they were presented with the relevant material and considered it on the application. There is no suggestion in the court files that this was done.

Because the prior appointments of Mr. Johnson by this court formed a cornerstone of Mr. Alberga's argument, I invited the Chief Justice and Levers, J. (the other two permanent members of the present court) to provide me with brief memoranda commenting upon what was, or was not, taken into account by them in their prior decisions. These memoranda were disclosed to Mr. Alberga and he was given a full chance to present argument on them.

Levers, J. confirmed that she was unaware of the concerns I have described above.

The memorandum from the Chief Justice indicates that his appointment of Mr. Johnson on July 18, 2003 in the winding up of Banco del Progresso and Banco de Prestamos was approached as a narrow question involving liability insurance coverage; the broader issues I have identified were not raised.

The Chief Justice has also confirmed in his memorandum (dated October 16, 2003) that he has been generally aware of the findings of the judges of this court in *Transworld, Cook-Bodden and Uzzell*. He said these findings "have not gone by without being of

concern" and that the cumulative effect of these and the delay in the *Latin American Bank* case would now cause him to raise the same concerns I have raised about Mr. Johnson's fitness for appointment.

Mr. Johnson took the position during this hearing that the memorandum from the Chief Justice is not something I can properly take into account. He asked me to disabuse my mind of it. In answer to a question from the bench, he confirmed that he was not seeking my recusal from the application.

I am still of the view that my request to the Chief Justice and his response were entirely appropriate in the circumstances. Surely, when the court is asked to make an appointment of this sort, the views of other sitting judges who have had personal experience with the nominee in similar matters are highly material. To exceed to the position that a judge making an appointment may not have regard to the views of any of the other members of his own court would be to deprive him of one of the most significant, perhaps the most significant, sources of information available. I do not think the question must be approached so narrowly. If the views of the other sitting judges of the court, based on their personal experience with the nominee in other liquidations, can not be considered, is it also the case that I would have to disregard my own experience (assuming I had some) with him on prior occasions? This would impose a most undesirable constraint upon the ability of the court to assess and supervise its own officers.

In any event, I am satisfied that any potential unfairness to Mr. Johnson arising from my request to the Chief Justice for his memorandum has been alleviated by disclosure of the memorandum to counsel and by according him a full chance to respond to it.

Conclusion

As far as the cases mentioned in the en banc decision are concerned, I am satisfied, from Mr. Johnson's explanation and a close reading of the relevant rulings, that there was no obligation upon him to report back to the court after obtaining fee approvals from the creditors and shareholders. It might have been more appropriate to advise the court of what had been accomplished, but it was not necessary.

I agree also that a fair reading of Mr. Justice Sanderson's ruling in the Banco del Progresso liquidation does not suggest, despite his use of the word "requires", that an answer was necessary in all circumstances. It was open to Mr. Johnson and the petitioner to deal with the problem as they did, by abandoning the attempt to have the offshore liquidator appointed. Again, some report back to the court might have been appropriate but was not required by the circumstances.

Mr. Justice Sanderson's use of strong language in the Uzzell case when preferring the evidence of the opposing expert over that of Mr. Johnson was unflattering, but cannot be said to have much bearing on Mr. Johnson's fitness for appointment as a liquidator.

The three concerns I have mentioned so far have been largely alleviated by the evidence and argument during the hearing. The other three are more troubling.

The Latin American Bank Liquidation has now run for twenty-six years. By any standard, that is extraordinary. When the Chief Justice requested answers from Mr. Johnson concerning the lack of notice to the shareholders, the lack of reference to the treatment of creditors in the liquidators' report, the total costs of the liquidation to date, and the reasons for the delay, he should have received a prompt answer.

A delay of about six months in answering these fundamental questions is inappropriate. At best, it would suggest that Mr. Johnson was too busy with other business matters to respond in a timely manner. This concern is heightened by the fact that there was a twelve-year gap, during which the matter was never brought before the court and no report, by letter or otherwise, was rendered to explain the apparent lack of progress. I am not here addressing the reasons for the delay, which have not been enquired into by me, but the lack of reporting on those reasons.

The concern arising from the Latin American Bank case is that Mr. Johnson is unable or unwilling to report on a regular and timely basis to the court on his activity as an official liquidator; this concern has not been alleviated by what I was told during the hearing.

In the Transworld liquidation, Mr. Justice Murphy said that Mssrs. Johnson and Jenkinson "ought not to have accepted the appointment", "should have resigned

subsequently once they had cause to doubt Transworld's solvency as they clearly did in 1997", and displayed no "ability or inclination to investigate the actions of former management" (which was clearly needed). There were other criticisms as well. He concluded that the two liquidators suffered from a lack of independence from former management.

The force with which these criticisms were expressed leaves me with substantial concern about the suitability of Mr. Johnson for a further appointment.

Moreover, while I accept his factual assertion that Mr. Jenkinson was the lead liquidator and spent over ten times as many hours working on the file as Mr. Johnson did, I am unable to view that as a convincing answer. Mr. Johnson was, at the time, a senior partner in the firm of Coopers & Lybrand and undertook the joint appointment in order to bring his expertise and experience to bear on this liquidation. The fact that Mr. Jenkinson was the "lead liquidator" would serve to explain why Mr. Johnson may not have been familiar with many points of detail; it does nothing to refute the fundamental criticism that the two joint liquidators should not have accepted the appointment, should have resigned, and failed to investigate former management in the manner demanded by the circumstances. These are fundamental criticisms which should have been addressed by either or both of the two joint liquidators; they were not mere operational questions which could be left in the hands of the lead liquidator to the exclusion of his partner.

Mr. Johnson says he doubted whether the firm which was advancing funds to cover the liquidation expenses would have been willing to finance an investigation into the conduct of former management. I infer, from the way this was put, that it was never asked if it would. In any event, if (if as Murphy, J. found) such investigation was warranted, the liquidators should either have initiated it or returned to the court for directions; they did neither.

In the result, I continue to view Mr. Johnson's role in the Transworld liquidation as evidence of his unsuitability for further appointment. The rigour of this conclusion is lessened, to a degree, by the evidence that Mssrs. Johnson and Jenkinson received legal advice from their attorneys that there was no specific cause for them to resign. However, in finding that they should have resigned, Murphy, J. cited professional obligations of the accountancy profession not discrete legal principles. Accountants are expected to understand and apply their own code of conduct, and that is not an obligation that can be delegated to attorneys.

With reference to the Cook-Bodden decision, Mr. Johnson asserted that Kellock, J. did not make any finding that Johnson's sworn evidence was untrue. Alternatively, he said that if Kellock, J. did disbelieve him he was wrong to do so.

Mr. Justice Kellock characterized portions of Mr. Johnson's evidence as "evasive", "less than frank" (on three occasions), and said he "cannot rely on the testimony" after having observed Mr. Johnson in the witness box. He said "some important aspects of the

evidence" were "incredible." He said he gained the impression that Mr. Johnson's evidence at trial was "tailored" to avoid the pitfalls raised by the pleaded defense. When dealing with costs, Mr. Justice Kellock repeated (for the third time) that Mr. Johnson's evidence was "less than frank" and then denied him his costs although he had been the successful party.

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 judgement and enquire into the correctness of these findings on credibility.

My conclusion is that a judge of this court has found that Mr. Johnson testified untruthfully during the trial of his claim against a former client. That, in turn, leaves me with deep concern about his suitability for appointment as an officer of this court.

As I said at the outset of this proceeding, what really matters is the cumulative effect of the various concerns I have raised. Collectively, they take on a weight and character which is perhaps lacking when each is viewed in isolation. With some hesitation and considerable regret, I have concluded that I should not appoint Mr. Johnson as a joint official liquidator of Pegasus Insurance Company.

My decision, of course, will appear to be at odds with decisions of other judges of this court in the recent past. I am not bound to accept their conclusions on this question of fact 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.

The application is dismissed. The Authority is at liberty to apply at any time for the appointment of Mr. Freeland and another nominee of its choice. I make no order as to costs.

Dated February 4th, 2004

Henderson, J.

Henderson, J.
Judge of the Grand Court