CJ/LIB

13/5/03

IN THE GRAND COURT OF THE CAYMAN ISLANDS

Cause No. 408 of 2001

IN THE MATTER OF THE BANK OF CREDIT AND COMMERCE INTERNATIONAL (0VERSEAS) LTD. (IN LIQUIDATION)

AND IN THE MATTER OF RULE 4.83(1) OF THE INSOLVENCY RULES 1986 (UNITED KINGDON)

BETWEEN:	**1.**	**M.S. BHATTI AND SONS INC.**	**APPLICANTS**
	2.	**LIBPAK INC.**	
AND:	**1.**	**IAN WIGHT (LIQUIDATOR OF BANK OF CREDIT AND COMMERCE INTERNATIONAL (OVERSEAS) LTD. (IN LIQUIDATION)**	**RESPONDENTS**
	2.	**MICHAEL PILLING (LIQUIDATOR OF BANK OF CREDIT AND COMMERCE INTERNATIONAL (OVERSEAS) LTD. (IN LIQUIDATION)**	
	3.	**MICHAEL MACKEY (LIQUIDATOR OF BANK OF CREDIT AND COMMERCE INTERNATIONAL (OVERSEAS) LTD. (IN LIQUIDATION)**	

APPEARANCES:
Mr. Robin McMillan of Hunter & Hunter for the Respondents

CORAM: KELLOCK J.

DATE: May, 2003

REASONS FOR JUDGMENT ON COSTS

In my reasons for judgment dated April 8, 2003, I allowed the Applicants' appeal from the Respondents (Liquidators) refusal to accept the Applicants' proofs of debt. In those reasons I expressed the opinion that the Liquidators had not only refused initially to properly consider the

merits of the Applicants' claims but had put forward by way of affidavit evidence on the appeal a recital of the relevant facts which was not only misleading but in my judgment deliberately so.

In the circumstances, I allowed the appeal with costs to the Applicants which I fixed at C.I. $10,000.00 plus Court fees. I concluded my reasons with the following statement:

> "I will hear submissions as to whether those costs should be paid by the Liquidators rather than come out of the assets under administration. (See Order 62 rule 6)."

On April 22, 2003, Mr. McMillan attended before me and submitted that I should not require the Liquidators to pay the costs personally on a number of grounds.

Mr. McMillan submitted that:

1. The Court had no authority to direct that the costs be paid by the Liquidators;
2. The Liquidators had not been guilty of any unreasonable acts or omissions and
3. To order the Liquidators to pay the costs would be "unhelpful to the administration of justice".

It is true, that Order 62 Rule 6 and Section 12.2 of the *Insolvency Rules* 1986 are concerned with the Liquidators' ordinary right to recover their fees and expenses from the funds held by them as Liquidators. That would include the C.I. $10,000.00 payable by the Liquidators to the Applicants.

There can be no question that the Court has jurisdiction to determine whether costs will be awarded, the scale of those costs and by whom those costs will be paid. The Court's jurisdiction even extends to making orders for the payment of costs by non-parties.

Consequently, I do not believe that any question of jurisdiction arises with respect to the range of costs Orders the Court is entitled to make in these circumstances. Rather the question is whether or not the Liquidators should bear the costs payable to the Applicants personally rather than charging them to the assets under administration in the liquidation.

Mr. McMillan submitted orally that it would be unfair to deprive the Liquidators of their right to an indemnity for the expenses of the liquidation in the absence of a charge of misconduct and the opportunity to be heard in defence. I pointed out to Mr. McMillan that my reasons for judgment delivered April 8, 2003 contain all of the particulars relevant to the cost question and the hearing before me on April 22, 2003 was the Liquidators' opportunity to satisfy me that they were entitled to recoup the costs payable to the Applicants from the fund in light of those reasons.

Mr. McMillan referred me to *Ridehalgh* v. *Horsefield* (1994) Ch. 205. That case involved an application for an order requiring a firm of solicitors to pay wasted costs personally. The application was resisted on the grounds that the solicitor's conduct had not been "improper, unreasonable or negligent" within the meaning of the applicable legislation. The orders sought were made but set aside on appeal on the basis that the words "improper, unreasonable or negligent" bore their established meaning. That is to say "improper" applied to conduct which amounted to a significant breach of a substantial duty imposed by a relevant code of professional conduct, "unreasonable" described conduct which did not permit of a reasonable explanation and "negligent" was to be understood to denote a failure to act with the competence reasonably to be expected. The Court of Appeal considered that the solicitors in *Ridehalgh* had been required by

their *Professional Conduct Rules* to accept the brief and thus a hopeless case and could not be faulted for pursuing it. Under English law people who wish to pursue hopeless cases are still entitled to representation.

In my judgment, more to the point are the following passages from *Picarda The Law Relating to Receivers and Managers* (1984).

At page 309 (after pointing out that the costs of all proceedings in the High Court (in England) are in the discretion of the Court).

> "where the circumstances warrant it, a Receiver like any other party may find himself penalized personally for costs. That unwelcome liability is visited upon a Receiver who causes unnecessary proceedings or litigious expense. Thus, a Receiver who occasions an unnecessary application or appearance may be mulcted in costs for the trouble he has caused. And a similarly adverse order may be granted against a Receiver who by his misconduct or default precipitates proceedings based on that misconduct or default". The author goes on to point out that the Receiver who suffers costs to accrue which he ought to have prevented will be made to pay the costs thereby caused. (*Picarda* pp. 309-310, 338-339).

I pointed out to Mr. McMillan during the argument, that Liquidators are Officers of the Court and are at liberty to apply to the Court at any time for advice should the circumstances make that course of action desirable. The point is made in the following authorities.

"One of the most useful facilities afforded the Liquidator in winding-up is the right of applying to the Court for advice when difficulties arise..." *O'Donovan, The Law of Company Liquidation* 1987 (p. 231).

see also in re: *Windsor Steam Coal Company (1901) Limited,* (1929), 1 Ch. 151 at p. 159 (per. Lord Hanworth M.R.) and re: *Home & Colonial Insurance Company*, (1930), 1 Ch. 102 at p. 125 (per. Maugham, J.).

In the circumstances of this case I am firmly of the opinion that the Liquidators should either have taken the trouble to properly investigate the Applicants claims or alternatively sought the advice of the Court as to the steps they should take and as to whether or not the proofs of debt should be rejected.

I can see no advantage whatsoever to the administration of justice or indeed to the promotion of orderly and efficient corporate liquidations to encourage Liquidators to act as the Liquidators in this case have acted.

Mr. McMillan argued that the Liquidators were in a difficult position because if they improperly admitted proofs of debt they could be personally liable. That is true and all the more reason why the Liquidators should seek the advice of the Court before improperly rejecting proofs of debt. Additionally, there was no need whatsoever in this case to mount an aggressive defence of the rejection of the Applicants claims in the appeal before me. In my judgment, the Liquidators should have simply explained what they had done and why they had done it and left it to the Court to decide whether or not the rejection of proofs was proper or not. The Liquidators did not adopt that course, instead they mounted an aggressive and misleading case and should be penalized in costs as a result. Accordingly, the Liquidators shall pay the Applicants' costs fixed in the amount of C.I. $10,000.00 personally and are jointly and severally liable to the Applicants

for those costs. In addition, the Liquidators are not entitled to indemnify themselves from the assets of the Bank of Credit and Commerce International (Overseas) Ltd. (In Liquidation).

I will also direct that these Reasons and the Reasons of April 8, 2003 be brought to the Court's attention if and when the Liquidators seek the Court's approval of their fees and expenses of this liquidation.

Dated: May 13, 2003

Released: May , 2003

Justice Kellock