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IN THE GRAND COURT OF THE CAYMAN ISALNDS

CAUSE NO. 408 OF 2001

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

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

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)**	

APPERANCES:
Mr. Paul Simon of C.S. Gill & Company for the Applicants
Mr. Robin McMillan Of Hunter & Hunter for the Respondents

CORAM: KELLOCK J.

DATE: 8th April 2003

GRAND COURT – CAYMAN ISLANDS

REASONS FOR JUDGMENT

THE APPLICATION

The Applicants M.S. Bhatti & Sons Inc. and Libpak Inc., apply to the Grand Court of the Cayman Islands pursuant to Order 102, rule 17 and the Insolvency Rules 1986, S.I. 1986 No.

1925, Ch. 9, Section A, Rule 4.83 for a reversal of the rejection of the proofs of debts of the Applicants by the Respondents on 9th November 2000.

The Bank of Credit and Commerce International (Overseas) Limited (hereinafter "BCCI Overseas"), having its registered office in the Cayman Islands, opened a branch in Monrovia, Liberia in 1979.

According to the affidavit of M.S. Bhatti sworn in Liberia on October 29, 2001 the first Applicant M.S. Bhatti and Sons Inc. is a company incorporated pursuant to the Business Corporation Act of Liberia, was engaged in the business of the retail sale of petrol and the transportation of poultry and other consumables in Liberia and had a place of business in the Liberian capital, Monrovia.

Libpak Inc. is also a Liberian company operating out of the same location as M.S. Bhatti and Sons Inc., and is engaged in the business of "renovating and refurbishing the vessel M/V Kona".

M.S. Bhatti is the president of both companies (which I will call "Bhatti and Sons" and "Libpak") and both companies were in June 1990 customers of BCCI Overseas with accounts at the bank's branch in Monrovia.

Because a civil war was raging at that time in Liberia, all banks operating in that country were authorised by the Liberian central bank, (The National Bank of Liberia) to suspend operations until normalcy was restored. The source of that information is *inter alia*, the Petition, presented

to the Liberian court by the National Bank of Liberia on October 5, 1991 by the central bank's attorneys. The Petition sought its appointment as the "Liquidation Officer" of the Monrovia branch of BCCI Overseas pursuant to the Liberian Financial Institutions Act.

Both the Applicants' and Respondents' witnesses relied on this document and accordingly no issue was taken as to its admissibility.

BCCI Overseas is a Cayman company and ceased operations on July 5, 1991 when the Respondent Ian Wight was appointed its Receiver. BCCI Overseas was then put into liquidation by an order of this court dated January 14, 1992.

Bhatti and Sons and Libpak subsequently provided the Respondent with proofs of debt relating to their accounts at the Monrovia branch of BCCI Overseas. The Respondents rejected those proofs and as a result this application was launched on June 29, 2001 pursuant to Rule 4.83 (1) of the Insolvency Rules.

THE FACTS

The application is supported by Mr. Bhatti's affidavit and the exhibits thereto. It appears from that affidavit that Bhatti and Sons sought a Letter of Credit from BCCI Overseas in May 1990 to facilitate the purchase of cigarettes from a company in New York. BCCI Overseas required Bhatti and Sons to provide to BCCI Overseas a margin deposit of an amount equal to 25% of the amount of the Letter of Credit sought. Consequently Mr. Bhatti swears that Bhatti and Sons deposited a total of US$135,860.00 between May 18, 1990 and July 2nd, 1990. The deposit slips

each apparently stamped by BCCI Overseas were made exhibits to Mr. Bhatti's affidavit. According to Mr. Bhatti, Libpak had a United States dollar account with BCCI Overseas's Monrovia branch, which had a credit balance of US$85,000.00 as of July 5, 1990. Two deposit slips are exhibited to the affidavit showing deposits of US$36,950.00 on June 28, 1990 and US$48,050.00 on July 2, 1990. Again the deposit slips bear BCCI Overseas's stamp.

The deposit slips indicate that the Bhatti and Sons deposits were made to account number 80525985 and the Libpak deposits to account number 01021562. All of the deposits were for relatively large sums and all were made in cash.

In addition the application for the Letter of Credit is provided as an exhibit to Mr. Bhatti's affidavit and has been prepared on a BCCI Overseas form. The invoice for the cigarettes issued by the New York firm is provided, together with BCCI Overseas statements to the Applicants. The BCCI Overseas account opening form for the Libpak account is also exhibited. In addition Mr. Bhatti exhibits two letters from the National Bank of Liberia. The first is dated January 4, 1993 and is addressed to Bhatti and Sons. In that letter Peter H. Boker the general manager of the Liberian central bank advises that:

> "The record of the Monrovia branch in liquidation indicates an amount of US$135,860.00 in account number 80525985 in the name of M.S. Bhatti And Sons Inc".

The second letter is also written by Mr. Boker. It is addressed to Libpak, is dated March 20, 1995 and states:

> "The record of the Monrovia branch in liquidation indicates an amount of US$85,000.00 in account number 01021517 in the name of Libpak Inc."

There is no explanation as to why the US$85,000.00 standing to Libpak's credit has been assigned a different account number than the account number appearing on the deposit slips, however it is clear from the BCCI Overseas account opening form that the Libpak account was opened on June 28, 1990 (the date of the first deposit) and assigned the number 01021562.

In any event the Applicants used the account numbers which appear in Mr. Boker's letters for the purposes of preparing their proofs of debt and that seems to me to be a reasonable thing to do. When the Respondent's received the Bhatti and Sons' proof of debt form they wrote to the Applicant seeking "the following documentation", namely;

- A copy of the company resolutions which approve the use of BCCI Overseas Liberia branch as a banking facility.
- Original bank statements for the margin account number 80525985 for the month of May and June.
- Evidence of the source of the cash deposited in the margin account and original deposit slips.
- A completed and notarial copy of the attached affidavit of debt.

That information was provided to the Liquidators.

On November 9, 2000 the Respondents wrote to both Applicants. While there were separate letters, the terms are almost identical. I will set out the contents of these letters in full.

THE LETTER TO BHATTI AND SONS

Dear Sir or Madam,

Re: **Bank of Credit and Commerce International (Overseas) Ltd. (In Liquidation) ("BCCI (Overseas)")**

We are in receipt of your proof of debt as follows:

Branch	Reference Number	Currency	Claim Value
Liberia	2680525985	US	135,860.00

The operations of BCCI (Overseas) ceased on July 5, 1991 when Mr. Ian A.N. Wight was appointed Receiver of BCCI (Overseas). On January 14, 1992, the Grand Court of the Cayman Islands ordered that BCCI (Overseas) be wound up and appointed Messrs. Ian A.N. Wight, Robert E. Axford and Michael W. Mackey as Official Liquidators on June 30, 1996, Mr. Michael Pilling replaced Mr. Robert Axford as Official Liquidator by order of the Grand Court dated June 21, 1996.

Your claim in the liquidation of the estate of BCCI (Overseas) as noted above is rejected. Your claim is rejected for the following reasons:

- The Official Liquidators have both the right and the duty to investigate the nature and grounds of each proof of debt. Accordingly, they regret to inform you of their conclusion that the evidence of the debt upon which this proof of debt is founded is in their opinion unsatisfactory.

- Margin account number 80525985, which is the account number you have claimed under, does not appear on the Liberian Deposit Register at June 27, 1990 being the date the Liberian Branch ceased operations.

Pursuant to Rule 4. 83(1) of the Insolvency Rules, 1986 (United Kingdom), which by order of the Grand Court of the Cayman Islands apply to the BCCI (Overseas) liquidation, a creditor who is dissatisfied with the liquidators' decision with respect to his proof of claim may apply to the Grand Court for the decision to be reversed or varied. Such application must be made within 21 days of receipt of this notice of rejection of claim. If you exercise this right of appeal, it may be necessary for you to retain counsel in the Cayman Islands and/or to attend personally for the court hearing. Please deliver to the Official Liquidators a copy of any application you may file with the Grand Court of the Cayman Islands.

Yours very truly,

Ian A.N. Wight
Official Liquidator

THE LETTER TO LIBPAK

Dear Sir or Madam,

Re: **Bank of Credit and Commerce International (Overseas) Ltd. (In Liquidation) ("BCCI (Overseas)")**

We are in receipt of your proof of debt as follows:

Branch	Reference Number	Currency	Claim Value
Liberia	2600008680	US	85,000.00

The operations of BCCI (Overseas) ceased on July 5, 1991 when Mr. Ian A.N. Wight was appointed Receiver of BCCI (Overseas). On January 14, 1992, the Grand Court of the Cayman Islands ordered that BCCI (Overseas) be wound up and appointed Messrs. Ian A.N. Wight, Robert E. Axford and Michael W. Mackey as Official Liquidators. On June 30, 1996, Mr. Michael W. Pilling replaced Mr. Robert E. Axford as an Official Liquidator, by order of the Grand Court dated June 21, 1996.

Your claim in the liquidation of the estate of BCCI (Overseas) as noted above is rejected. Your claim is rejected for the following reasons:

- The Official Liquidators have both the right and the duty to investigate the nature and grounds of each proof of debt. Accordingly, they regret to inform you of their conclusion that the evidence of the debt upon which this proof of debt is founded is in their opinion unsatisfactory.

- Current deposit account number 01021517, which is the account number you have claimed under, does not appear on the Liberian Deposit Register at June 27, 1990, being the date the Liberian Branch ceased operations.

Pursuant to Rule 4. 83(1) of the Insolvency Rules, 1986 (United Kingdom), which by order of the Grand Court of the Cayman Islands apply to the BCCI (Overseas) liquidation, a creditor who is dissatisfied with the liquidators' decision with respect to his proof of claim may apply to the Grand Court for the decision to be revised or varied. Such application must be made within 21 days of receipt of this notice of rejection of claim. If you exercise this right of appeal, it may be necessary for you to retain counsel in the Cayman Islands and/or to attend personally for the court hearing. Please deliver to the Official Liquidators a copy of any application you may file with the Grand Court of the Cayman Islands.

Yours very truly,

Ian A.N. Wight
Official Liquidator

The Applicants' claims were rejected because the account numbers the Applicants "claimed under did not appear on the Liberian Deposit Register at June 27, 1990 being the date the Liberian Branch ceased operations." It is not difficult to see the inference here. How could the applicants have deposited money on July 2, 1990 when the bank was no longer operating?

The Respondents' case is now founded on the evidence of Stuart Sybersma, provided in two affidavits. Mr. Sybersma is a chartered accountant and a partner in Deloitte and Touche, Grand Cayman. (I assume all of the Respondents are partners or associates of the Cayman office of Deloitte and Touche.) Mr. Sybersma swears that he has "responsibility for overseeing the administration of the liquidation of BCCI Overseas".

In his first affidavit Mr. Sybersma expands upon the reasons for the Liquidators' rejection of the Applicants' proofs of debt as follows:

2. "I am a Partner with Deloitte and Touche, Grand Cayman, Cayman Islands with responsibility for overseeing the remaining branch claim issues of BCCI Overseas. I am duly authorized by the Official Liquidators to swear this affidavit. Save where otherwise appears, I depose to the following from the facts within my own knowledge and from the records of BCCI Overseas.

3. I have been informed, and verily believe that the Monrovia, Liberia branch of BCCI Overseas ceased operations on 27 June 1990, due primarily to civil disturbances in the country at the time. By Petition dated 5 October 1991 signed by Isaac E. Wonasue, Legal Counsel for National Bank of Liberia, it was confirmed "that on June 27, 1990 when the civil disturbances reached Monrovia, all banks, including the Respondent, obtained permission from the Petitioner to suspend their business operations until normalcy was restored and all Respondent's senior management left Liberia and has never returned." A true copy of the said letter is now shown to me and appears on pages 1 to 3 in Exhibit "SS1". Furthermore, in an independent legal opinion from H. Varney G. Sherman, of Sherman & Sherman, Counselors-At-Law in Monrovia, Liberia on the effect of the civil war in Liberia on the status of employees of the Bank of Credit and Commerce International it was noted that" commercial banks did not conduct business in Liberia since June 27 1990." A true copy of the said opinion is now shown to me and appears on pages 4 to 11 in Exhibit "SS1".

4. Bank registers are fundamental to the business of banking, and contain a listing of all depositors and creditors of a bank. It is reasonable for the Official Liquidators to expect that the deposit register of a bank would contain a listing of all depositors of the bank at the date of its production, and for the Official Liquidators to rely upon such listing.

5. A true and valid copy of the deposit register of the Monrovia branch as at 27 June 1990 has been provided to the Official Liquidators, which reflect the full listing of all true account holders at that date.

M.S. Bhatti & Sons

6. M.S. Bhatti & Sons have filed a Proof of Debt in the Cayman liquidation of BCCI Overseas under claim reference number 2680525985, claiming a Margin on Letter of Credit in the amount of $135,860.00 United States Dollars. The claim was filed on or around 7 April 1998.

7. This claim under reference number 2680525985 was rejected in full as the account number 80525985, does not appear on the bank deposit register dated 27 June 1990. A true copy of an excerpt of the 27 June 1990 'margin on deposit' register, showing that this account does not appear thereon, is now show to me and appears on page 12 in Exhibit "SS1". The Claimant's name also does not appear on the 2 July 1990 financial statements. A true copy of excerpts of the 2 July 1990 financial statements, showing that the Claimant's name does not appear, is now shown to me and appears on pages 13 to 17 in Exhibit "SS1". The Claimant's name also does not appear on the 2 July 1990 'margins on deposit' register, the total of which agrees to the 31 December 1994 financial statements prepared by the National Bank of Liberia. A true copy of excerpts of the 31 December 1994 financial statements is now shown to me and appears on pages 18 to 20 in Exhibit "SS1". A true copy of the 2 July 1990 register of 'margins on deposit' is now shown to me and appears on pages 21 to 22 in Exhibit "SS1".

8. The bank statements as shown in the Claimant's affidavit under page 20 of "MSB1" appears to have been typed, and not computer driven as have the bank statements of all valid Monrovia branch claimants, which makes it appear highly suspicious in nature to the Official Liquidators.

9. The account opening documents as shown in the Claimant's affidavit under pages 15 and 16 of "MSB1" are for account 01003275, which is a different account number that as claimed under Proof of Debt claim reference number 2680525985. The 27 June 1990 Liberian dollar deposit register proves that the account opening documents provided in the Claimant's affidavit are incorrect, as the bank register shows this account to be a Liberia dollar account, and the account opening document show it to be a United States Dollar account. A true copy of an excerpt of the 27 June 1990 Liberian dollar deposit register, is now shown to me and appears on pare 23 in Exhibit "SS1". In these premises, the Official Liquidators consider the Proof of Debt to be unsatisfactory.

Libpak Inc.

10. Libpak Inc. filed a Proof of Debt in the Cayman liquidation of BCCI Overseas under claim reference number 2600008680, claiming a deposit of $85,000.00 United States Dollars in a current account. The claim was filed on or around 7 April 1998.

11. This claim under reference number 2600008680 was rejected in full as the account number 01021517 as claimed does not appear on the bank deposit register dated 27 June

1990. A true copy of an excerpt of the deposit register, showing that this account does not appear thereon, is now shown to me and appears at pages 24 to 25 in Exhibit "SS1". This Claimant's account number does appear on the 14 January 1992 register, but the name of the account holder is Silver Store, and the amount on the 14 January 1992 register is different than the claim amount under the Claimant's Proof of Debt. A true copy of the 14 January 1992 deposit register, showing this account number, is now shown to me and appears on pages 26 to 33 of Exhibit "SS1".

12. We note in paragraphs 11 and 12 of the Claimant's affidavit dated 30 October 2001, that reference is made to account 01021562, which is different than the supporting schedules attached to the said affidavit, and differs from the account number of the Proof of Debt as filed by the Claimant, which is 01021517.

13. We note that the account opening documents and bank statements as provided by the Claimant on pages 36 to 40 in Exhibit "MSB1" have the same account number, being 01021562, but this account number differs from the letter from National Bank of Liberia, exhibited by the Claimant on page 46 in Exhibit "MSB1", and the Proof of Debt as filed in the Cayman liquidation which both show the account number 01021517. It should be noted here that account 01021562 does not appear on the 27 June 1990 bank register, nor on the 14 January 1992 register. In these premises, the Official Liquidators consider the Proof of Debt to be unsatisfactory.

14. The account opening document for Libpak show that the account was opened on 28 June 1990, which is 1 day after the branch was closed. Furthermore, given the ongoing civil war at this time, it is inherently unlikely that accounts were being opened during this period".

Mr. Sybersma concludes as follows;

15. "The major reason for the rejection of the claims filed by M.S. Bhatti and Sons and Libpak Inc. is due to the accounts not appearing on the bank deposit register as at 27 June 1990, nor any of the other deposit registers. Furthermore, it is very suspicious for these claims to be filed at this late stage in the liquidation, nearly 10 years after the collapse of the bank".

The Respondents' position is that the circumstances described by Mr. Sybersma established not only that the liquidators properly rejected the applicants' claims but that the court should dismiss this application for the same reasons.

ANALYSIS

The first factual issue is whether or not the Monrovia branch of BCCI Overseas closed its doors on June 27, 1990 (as Mr. Sybersma says). If it did then deposits made on July 2, 1990 would do more than arouse suspicion. The Applicant's contention that such was the case rests upon paragraph 3 of Mr. Sybersma's affidavit which states:

> "I have been informed and verily believe that the Monrovia branch of BCCI Overseas ceased operations on June 27, 1990 due primarily to civil disturbances in the country at that time".

This statement offends Order 41 Rule 5 even assuming that evidence on information and belief is admissible on this application, (and I regard that as a doubtful proposition), as the source of the information is not given.

Mr. McMillan contended that the source is the documents which Mr. Sybersma mentions later in paragraph 3, but that does not solve the Respondents' problem. The fact remains that the evidence is technically inadmissible.

The first document mentioned is the central bank's petition which I referred to earlier. It is not "A Letter" despite Mr. Sybersma's description of it as such, and it was not a communication from it's author to Sybersma or anyone else at Deloitte and Touche. Mr. Sybersma does not say he has ever spoken to Mr. Wonasue.

In any event the petition simply states that the banks in Monrovia "obtained permission ..... to suspend their business operations" on June 27, 1990. That does not establish that any bank (and in particular the Monrovia branch of BCCI Overseas) actually shut down or June 27, 1990 or on any other date.

Mr. Sybersma goes on to refer to "an independent legal opinion from H. Varney G. Sherman" (a Monrovian lawyer) from which is taken (or perhaps it would be more accurate to say Mr. Sybersma has selected) the following quotation; "commercial banks did not conduct business in Liberia since June 27, 1990". Mr. Sybersma does not swear that he has ever spoken to Mr. Sherman. Mr. Sybersma's information is therefore based on these two documents.

Mr. Sherman's firm signed the National Bank's petition for the liquidation of the BCCI Overseas Monrovia branch. His "independent legal opinion" (so called) is in fact a memorandum to his client, the purpose of which is to "enlighten" BCCI Overseas on its rights and obligations under "Liberian Labour Law" to its former employees for severance compensation, as the result of the termination of their employment. Mr. Sybersma does not explain how the content of that memorandum may be properly described as 'independent.' Legal opinions provided by lawyers to their clients are not usually described as 'independent'. While such legal opinions are supposed to be 'objective' and reliable I do not believe that the use of the word "independent" is at all appropriate in the circumstances.

It is of course not surprising that some litigants seek to bolster their cases by the use of self-serving adjectives as Mr. Sybersma has done here. That practice is I think, more likely to create

a negative rather than a positive reaction in a judge's mind, particularly when the evidence is put forward by liquidators who are officers of the court. The sentence quoted by Mr. Sybersma as to the date the bank closed is part of a much longer passage in Mr. Sherman's memorandum, and that passage reads as follows;

> "On June 27, 1990, the Liberian civil war reached Monrovia, BCCI's place of business. On that day, a peaceful demonstration calling for the resignation of the Doe Administration was disrupted by armed soldiers shooting at defenseless civilians. The Bankers Association of Liberia (BCCI is a member) obtained permission form the National Bank of Liberia (the central bank) to close down their offices. On July 2, 1990, the forces of the National Patriotic Front of Liberia overran and seized Paynesville, a suburb of Monrovia and started their main onslaught on Monrovia. Commercial banks did not conduct business in Liberia since June 27, 1990 until recently as May, 1991 when the Rovia Bank, Meridien Bank and the First Commercial & Investment Bank opened their doors to the public. Monrovia was a battle ground and it is believed that no where else was a battle fought as ferociously as Monrovia nor was there any other place where heavy arms and artillery used (sic) as in Monrovia. The destruction of properties and the wanton massacre of non-combattant (sic) were at an unbelievable scale; everything was simple savagery and atrocity. Not only were BCCI's properties destroyed and stolen; but also the security of the person of its management made it impossible for BCCI to continue business in Monrovia. It was also impossible for the employees to go to work for the same reason. Commercial frustration or force majeure therefore commenced on June 27, 1990 and it was the civil war which made the employees redundant. The civil war caused the employees to lose their employment through no fault of themselves or BCCI.
>
> As it is not BCCI, but rather the Liberian civil war, which made the employees redundant; BCCI's notice to the employees is not a declaration of the redundancy. A declaration of redundancy cannot be retroactive; it must be prospective. BCCI's notice therefore should be properly articulated to ensure that the effective date of the redundancy is June 27, 1990 – the date on which the civil war directly affected Monrovia and there was a clear and present danger to the persons and lives of the inhabitants of Monrovia and their properties. If the notice is not properly articulated, a Liberian court could very well hold that for the period between June 27, 1990 until the date of the notice, BCCI should pay the employees their salaries and then pay redundancy compensation thereafter on the grounds that the notice shows a clear intent of the continuity of employment before the issuance of the notice. So the notice to the employees is not so much a notice of redundancy as it is a notice as to how and when the redundancy

> compensation will be paid. It is also a notice of the regret of the employer for the circumstances and its sympathies for the difficulties experienced by the employees. If the notice as articulated by the employer is perceived by the reasonable man as a notice of redundancy, then under Liberian law the effective date of the redundancy will be prospective to the date of the notice".

It is clear from this passage that Mr. Sherman is advising the bank as to the date of "effective redundancy" for the purpose of employment law, being the date the civil war "directly affected Monrovia". It is further apparent that he is advising the bank to choose as early a date as the circumstances could justify so that the notice to employees would be prospective.

It is also clear (assuming Mr. Sherman's account to be accurate) that the rebels did not seize Paynesville, a suburb of Monrovia, until July 2, 1990 although the civil war had "reached Monrovia on June 27, 1990. It may be that Paynesville stands in the same relation to the location of the bank as Hammersmith to the financial district of London ("the city") This opinion is not reliable evidence of the fact for which Mr. Sybersma used it.

In opposing this application the Respondents also rely upon the deposit register's of BCCI Overseas's Monrovia branch, "true copies" of which Mr. Sybersma swears he has exhibited to his affidavit.

This is an important reliance as Mr. Sybersma also swears (in paragraph 4 of his first affidavit) that bank registers are fundamental to the business of banking and therefore "it is reasonable for the official liquidators to expect that the deposit register of a bank would contain a listing of all depositors of the bank at the date of its production".

Assuming that deposit registers (or records of deposits however described) are fundamental to banking and that such can be expected to contain records of deposits, one would not expect to find a record of all deposits unless one was satisfied he had examined the complete record. I will return to this point shortly.

Mr. Sybersma relies upon "the 2 July 1990 Register on margins of deposit", a register of the Monrovia branch of BCCI Overseas.

If the Monrovia branch shut down on June 27, 1990 how and by whom was the July 2, 1990 register prepared? Mr. Sybersma does not attempt to explain how the Liquidators rely on the fact that the bank closed on June 27, 1990 to suggest there is something fishy about the applicant's deposits, and then rely on a bank register of July 2, 1990 for the same purpose. Clearly the fact that there is a bank register for July 2, 1990 suggests that the bank was in operation through July 2nd if not longer. (I also note that the Sherman opinion states that BCCI's properties were destroyed and stolen as a result of the civil war so that it seems impossible to say what bank records survived the war and what records did not.)

The exhibits to Mr. Sybersma's first affidavit include a letter dated May 15, 1992 from BCCI Overseas Monrovia branch to Deloitte and Touche's Ivory Coast office forwarding the balance sheet and financial statements of BCCI Overseas Monrovia "as at close of operations on July 2, 1990." Mr. Sybersma does not attempt to explain the provenance of such a record. Mr. Sybersma gives no indication that he has ever been in communication with the author of that letter (S.I.V. Kamara) but he relies on these financial statements to cast doubt on one aspect of

the Applicants' case, without apparently noticing that it fails to support his assertion that the bank closed on June 27, 1990.

Even more disturbing is Sybersma's failure to mention a letter dated August 21, 2000 from S.I.V. Kamara ("international officer (BCCI) Monrovia branch at the time of the closure) providing information which is attested to by Isaac E. Wonasue legal counsel, Central Bank of Liberia. This letter is addressed to the Official Liquidators in George Town and received by them by fax on August 21, 2000. Indeed the Liquidators acknowledged that they received both a copy by fax and the original in the mail.

This letter is not mentioned in the liquidator's rejection letters of November 9, 2000 nor is it mentioned by Mr. Sybersma in either of his affidavits, (sworn in October 2001 and September 2002.) Mr. Kamara is of course the author of the May 15, 1992 letter to Deloitte and Touche which I have already referred to and Mr. Wonasue is a signatory to the petition Mr. Sybersma relies upon to establish that the Monrovia branch was shut down on June 27, 2000.

I will set forth the content of this letter in full:

"August 21, 2000

Mr. Darren Jack
For the Official Liquidator
Bank of Credit & Commerce International
(OVERSEAS) Ltd. (IN-LIQUIDATION)
Head Office P.O. Box 1359
Grand Cayman
Cayman Islands
Fax: (345) 949-8258

Dear Mr. Jack:

BCCI Monrovia Branch closed down on July 2, 1990 when the fighting hit Monrovia. This day was the last working day.

Signed: _____
S.I.V. KAMARA
INTERNATIONAL OFFICER
(BCCI) MONROVIA BRANCH
AT THE TIME OF CLOSURE

ATTESTED: _____
ISSAC E. WONASUE
LEGAL COUNSEL
CENTRAL BANK OF LIBERIA"

Both gentlemen appear to have signed this letter.

There was no evidence nor any submissions to the effect that this document was, for any reason unreliable.

I will now deal with the Respondents' reliance upon the Monrovia branch deposit registers. My first observation is that the records exhibited to Mr. Sybersma's affidavit are clearly fragmentary. They are obviously not complete and Mr. Sybersma does not say they are complete as he would have no way of knowing whether they were complete or not. However, it is plain from his conclusions that he treated them as if they were complete.

Secondly, the registers contain what I will call 'collective entries' which is to say that a number of depositor's deposits have been lumped together and described as "miscellaneous." It is therefore misleading in the extreme to say (as Mr. Sybersma does) that the Applicants' names do not appear in those registers. That may technically be the case but it does not mean what Mr.

Sybersma invites the reader of his affidavit to conclude. Thirdly, depositors have no control over what records a bank keeps or whether those records are properly or improperly kept. I there fore have had no difficulty in reaching the conclusion that the Applicants' proofs of debt were improperly rejected.

I asked Mr. McMillan during argument what it was that his clients could properly expect a depositor to supply in proof of the bank's obligations to him other than the deposit slips and the bank statements he has received. He submitted that the depositor was obliged to provide additional evidence, such as the evidence of someone who was present at the bank when the deposit was made or the teller who accepted the deposit. I regard this submission as quite simply foolish. What depositor would take a witness to the bank suspecting that the bank would sometime later deny it's obligation? One would not deposit money in such a bank in the first place. What teller would be likely to remember one of many routine transactions undertaken each day unless there was something memorable about it?

However these submissions were enlightening as they demonstrate the Liquidators' mind-set and serve to explain the rejection letters of November 9, 2000. The Liquidators seem to have taken the position early on that the Applicants' claims were to be regarded with suspicion. If the reasons for those suspicions are those put before me in Mr. Sybersma's evidence they are in my judgment lacking in cogency. All evidence to the contrary has simply been ignored. Bhatti and Sons and Libpak seem to exist, have an address in Monrovia and seem to have responded to all communications from the liquidators and their advisers over several years despite the turmoil in that country. Mr. Bhatti provided a sworn affidavit in September 1998 and again in October

2001. I was not advised that any steps were taken by or on behalf of the Liquidators to check as to whether or not he is or is not a reputable business man. There is no evidence that any such investigations were undertaken. In addition it is abundantly clear that no steps were taken by or on behalf of the Respondents to cross-examine Mr. Bhatti in Liberia or require his attendance here for that purpose. Instead I was simply invited by counsel for the Respondents to adopt the Liquidators' suspicious attitude and deny the Applicants' claims for want of proof. The standard of proof being unexplained and unarticulated by the Liquidators.

THE LAW

Mr. McMillan submits that the court should adopt the test set forth in the *Van Laun* case (*In re Van Laun* (1907) 2 KB 23. In that case Cozens-Hardy M.R. approved the following passage from the judgment of Bigham J in the court below (at pg. 30)

> "Now it does not follow in the least by what I have said, and by the order which we propose to make in dismissing the appeal, that Mr. Chatterton will not be entitled hereafter to prove for these amounts. All that we now decide is, that the trustee is entitled to say, "I will not admit your proof until you have given me reasonable means of satisfying myself whether the debt in respect of which you are proving is to any and what extent justifiable and reasonable."
>
> I have not put my propositions in such terse and good language as Bigham J. did, but in effect they are identical with those which he has laid down in the passage which I will now read:
>
> "The trustee's right and duty when examining a proof for the purpose of admitting or rejecting it is to require some satisfactory evidence that the debt on which the proof is founded is a real debt. No judgment recovered against the bankrupt, no covenant given by or account stated with him, can deprive the trustee of this right. He is entitled to go behind such forms to get at the truth, and the estoppel to which the bankrupt may have subjected himself will not prevail against him. In the present case the trustee desires to satisfy himself that the claims for costs represent a real indebtedness. He can only do this by seeing and examining the bills. When he sees them it may be that he will think them fair and reasonable and, if so, he will probably admit the proof. But until Mr. Chatterton furnishes

> him with the means of forming an opinion I think the trustee cannot do otherwise than reject the proof."

The issue before the Court of Appeal in *Van Laun* was whether or not the trustee in bankruptcy was bound by a statement of accounts settled between the bankrupt and the creditor. Bigham J decided that as the trustee represented the general body of creditors, he was entitled to go behind the settled account. When the creditor refused to cooperate and supply the information the trustee had requested, the trustee was justified in rejecting the creditor's proof of debt. Nevertheless, the Master of the Rolls made it clear that the creditor was not being foreclosed and was still entitled to attempt to prove his claim. Even if I could conclude that the Applicants' proofs of debt were properly rejected (which is not the case) that is not the issue before me. I am called upon to decide this Application upon the evidence before me (not the evidence that the Liquidators chose to rely on) and to decide based on the full record whether or not the Applicants are or are not creditors of BCCI Overseas.

The applicable law is clearly laid down in the cases in this court and in England brought to my attention by Mr. Simon. The hearing of this application is a hearing *de novo*.

In *Anklesaria v Bank of Credit and Commerce International (Overseas) Limited* 1999 CILR 43, Mr. Justice Murphy said at pg. 46 :

> "On this appeal I am of course not limited to deciding whether the liquidators were right, on the evidence before them, in reaching their decision to reject the proof of debt. I can decide the appeal by way of a rehearing *de novo,* on fuller evidence, and that is what I have done. See *In Re Kentwood Constructions Ltd.* [1960] 2 All ER 655n and *In Re Trepca Mines Ltd.* [1960] 3 All ER 304n."

I note that the *Anklesaria* case involved the same liquidators and attorneys as this case.

The first of the authorities relied on by Murphy J was *Re Kentwood Constructions Ltd.* and it is instructive. In that case the creditor was a firm of accountants who sought to recover their fees against the alleged debtor which was in liquidation. The liquidator rejected the accountants' proof, apparently on the basis that the fees claimed were excessive. Buckley J said (pg. 656):

> "Counsel for the claimants submitted that in proceedings such as this, the court must decide what amount was proper to be paid on a quantum meruit basis in just the same way as it would in an ordinary action for remuneration based on a quantum meruit. Counsel admitted that the onus initially rested on him to establish that he had done work meriting the amount of remuneration which his clients claimed, but he contended that on the evidence he had discharged that onus, or that at any rate he had discharged it to a sufficient extent to shift the onus to the liquidator to show that the amount claimed was in fact excessive and unreasonable. He said that the case which he had come to meet was not that the claim was insufficiently substantiated by evidence but that the amount claimed was excessive, and he argued that the liquidator was not justified in rejecting a proof in whole merely on the ground that the claim was excessive, for, if the liquidator regarded the claim as excessive, he must, by implication at least, be bound to admit the claim in part, although he might be entitled to reject the proof because he had not been provided with sufficient evidence to quantify that part.
>
> On the other hand it was argued, on behalf of the liquidator, that the question before the registrar was simply whether the liquidator was right or wrong, on the evidence available to him, in rejecting the proof. His Lordship did not think that that was the function of the court on an appeal from a rejection of a proof. When an application was made to the court to reverse such a decision of a liquidator, evidence was filed which was commonly much fuller than the evidence available to the liquidator at the time when he decided to reject the proof, and the court was bound to decide the rights of the claimant in the light of the evidence which was before the court and not merely to express a view on whether the liquidator was right or wrong in rejecting the proof when he rejected it. It was perhaps significant that the Companies (Winding-up) Rules, 1949, by r. 108, provided that, if a creditor or contributory were dissatisfied with the decision of the liquidator in respect of a proof, the court might, on the application of the creditor

> or contributory, reverse or vary the decision. It was not merely the function of the court to say that a decision was right or wrong; it might vary the decision in any way that it thought necessary in the light of the evidence before the court. The court must approach the question de novo and determine to what extent the creditor ought to be allowed to rank as a proving creditor. His Lordship reviewed the evidence and found that the liquidator had not displaced the applicants' sworn statement, supported by reasonable indication of the work done, that £525 was a fair and reasonable fee for their work. His Lordship discharged the registrar's order and directed that the applicants' proof be admitted in full."

CONCLUSIONS

Mr. McMillan puts the case for the Respondents as follows in his skeleton argument;

> ".....The Applicants' assertion in express terms, that there is no proof that the deposit slips are not genuine fully demonstrates the Applicants' fundamental misconceptions as to the burden and standard of proof. The production of alleged deposit slips which are not supported by any corresponding bank register entries if anything enhances rather than diminishes their difficulties in terms of proving their case upon a balance of probabilities".

I accept, as I believe Mr. Simon did, that he is obliged to establish the Applicants' case on the balance of probabilities. That is to say that the burden of proof lies upon the party who substantially asserts the affirmative of the issue. (Phipson on Evidence 15th edition paragraph 4 – 03).

Based on Mr. Bhatti's uncontradicted evidence which is supported by the deposit slips stamped by the bank and the expected bank documents (i.e. the LC application in the case of the Bhatti and Sons' claim and the account opening record in the case of Libpak's claim), Mr. Simon submits that the case is proved.

Mr. McMillan on the other hand argues that the claims must be substantiated or corroborated by other bank documents, i.e. the bank registers and by witnesses to the deposit.

However, Mr. McMillan acknowledged that the bank registers produced are unreliable and I have already pointed out that the Applicants can have no responsibility for the creation or content of those registers. Nor could they be expected to have taken witnesses to the bank in the expectation that the bank would later say the deposits were never made. Nevertheless Mr. McMillan still insisted that the Applicant's had an obligation to adduce "impeccable" evidence before their claims could be admitted and dividends paid. However Mr. McMillan would not say that the Respondents' case is that the Applicants are engaged in putting forth fraudulent claims, perhaps because he was aware that the burden of proving fraud would then be on him.

The law is stated by the editors of Phipson in these words;

> "As a general rule, courts may act on the testimony of a single witness even where there is no other evidence which supports it. Indeed where in a civil case such testimony is unimpeached the court should act on it..... Similarly, as a general rule, the courts may act upon duly proved documentary evidence without such testimony at all....."
>
> "But common sense and experience suggest, however, that there are certain categories of witnesses and certain types of evidence which it is dangerous to rely on if they are not supported by other evidence." (Phipson on Evidence 15th edition paragraph 13 – 01)

The editors of Phipson then go on to discuss the need for corroboration in some criminal cases and when required by statute. None of these examples apply to this application. Common sense and experience do not require the Applicants to discharge some special burden of proof by "impeccable evidence".

If the Respondents in this case, or Liquidators in any other case, suspect that a creditor's claim is fraudulent they are entitled, if not obliged, to investigate and to require the creditor (or would be creditor) to cooperate in that investigation and respond to all reasonable requests for information.

However, Liquidators are not entitled to simply sit back and refuse to be satisfied as to the *bona fides* of any claim. If the Respondents' case is that the Applicants' claims are fictitious, which is to say fraudulent, it is up to the Respondents to allege and prove that case. It is not up to the Applicants to satisfy the Respondents that their claims are legitimate beyond whatever unknown and unknowable subjective or arbitrary standard the Respondents demand as the price for being "satisfied."

To paraphrase Phipson, if the Respondents allege fraud, the burden of proof lies upon them to prove it. The Respondents have declined to accept or discharge that burden and accordingly the Applicants' appeals must be allowed.

Accordingly, the decision of the Liquidators is reversed and the Applicants' proofs are ordered to be admitted in full. The Applicants' costs are fixed in the amount of CI$10,000.00 plus the court fees and are payable forthwith. 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).

April 8/2003

Justice Kellock

GRAND COURT CAYMAN ISLANDS