IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN

CIVIL APPEAL NO. 8 OF 1998
GRAND COURT CAUSE NO. 62 OF 1993

BETWEEN: **DELTA AMERICAN REINSURANCE COMPANY (IN LIQUIDATION)** APPELLANT

AND: **G. E. CLEAVER AND NOEL BODDEN** RESPONDENTS

BEFORE: RT. HONOURABLE EDWARD ZACCA, PRESIDENT
HONOURABLE MR. JUSTICE JAMES KERR, J.A.
HONOURABLE MR. JUSTICE GERALD COLLETT, J.A.

Mr. Ross McDonough instructed by Messrs. Bruce Campbell and Company for the Appellants. Mr. Guy Locke instructed by Messrs. W.S. Walker and Company for the Respondents.

Heard on the 23rd and 24th days of November 1998. Decision delivered on the 16th day of April 1999.

KERR, J.A.:

The Appellant, "Delta Re", is an insurance company of and under the Laws of Kentucky in the United States of America and licensed to do business in Kentucky and New York. Delta Re was placed in liquidation by the Court in Kentucky in September, 1985. The Respondents are the Liquidators of the Transnational Insurance Company Limited ("Transnational"). Transnational was incorporated and licensed under the laws of the Cayman Islands and carried on the

business of retrocessionaire – a reinsurer of reinsurance companies in relation to property and third-party risks. Transnational was placed into voluntary liquidation in January 1993 and in March 1993 the winding-up proceedings came under the supervision of the Cayman Court.

In March 1984 Delta Re entered into a Retrocession Agreement ("the Agreement") in which Delta Re ceded and Transnational accepted a percentage of Delta Re's liability under certain of Delta Re's contracts and treaties of reinsurance. The Agreement was described as "typical", that is, "A quota share reinsurance contract by which Delta Re paid to Transnational (as it did to other party retrocessionaires) a percentage of premiums which it received from its insured in return for the acceptance by Transnational of that percentage of Delta Re's liabilities for losses it insured and by means of which Transnational agreed to indemnify Delta Re in respect of liabilities to that extent."

Delta Re and six other companies in similar contractual relations submitted claims for covered losses in the liquidation of Transnational. As Delta Re's claim was only partially admitted by the liquidators, an application on behalf of Delta was made to the Grand Court requiring the liquidators to admit the entire claim. The application was made pursuant to Rule 4.83 of the Insolvency Rules of the United Kingdom (U.K.) (S.I. 1986 No. 1925) which is rendered applicable to the Cayman Islands by Rule Order 102, Rule 17 of the Grand Court Rules and which reads:

> " **(1) If a creditor is dissatisfied with the Liquidator's decision with respect to his proof (including any decision on the question of preference), he may apply to the court for the decision to be revoked or varied.**"

The application sought, inter alia, the following:

1. " **An Order that the decision of the Respondents rejecting in part the proof of the debt of the Applicant in the liquidation of Transnational Insurance Company Limited (" the liquidation") may be varied and that the said proof may be ordered to be admitted as to US$1,583,648.40.**
2. **A Declaration or Declarations:**
   (a) **that the Applicant was a secured creditor in the liquidation to the extent of US$735,393.00 being the sum paid by Barclays Bank PLC on behalf of Transnational Insurance Company Limited to the Applicant pursuant to an Order of the United States District Court Southern District of New York in proceedings under No. 89CIV299 made on the 30th June 1993;**

   further, or alternatively,

   (b) **that the payment of the sum of US$735,393.00 as aforesaid did not represent a part payment of any distribution or dividend which may be due to the Applicant in the liquidation.**

3. **An Order that the Respondents may pay the Applicant such interim dividend as is properly due and owing to it following determination of the applications made in the paragraphs 1 and 2 above."**

The application was heard and determined by Smellie, C.J., on March 4th 1998, and in his written judgement with concise clarity he identified the following three questions as arising for his determination:

(1) with respect to the letter of credit in the sum of US$753,393.00 drawn by Delta Re after Transnational went into liquidation upon the execution of default judgment against Transnational, whether or not Delta Re was entitled to treat it as security for its face value and, in addition, entitled to claim for the balance owed in Transnational liquidation;

(2) whether or not Delta Re was entitled to claim certain contingent liabilities – Incurred but not reported losses (IBNR); and

(3) whether or not Delta Re was entitled to interest claimed on losses which had been paid on claims prior to the liquidation proceedings of Transnational.

The Learned Chief Justice for the reasons set out in his written judgment found in effect that re (1) above, Delta Re was entitled to pursue its claim under the Letter of Credit in the New York Court but as the insolvency proceedings intervened before the conditions for enforceability in the letter had been met, the amount of the Letter of Credit remained part of the debtor's estate and, accordingly, Delta Re was faced with an election situation either to keep the amount realised on the Letter of Credit or bring the amount into hotchpot if it seeks to claim in the liquidation.

Re (2) – he upheld the IBNR claim of Delta Re; and

Re (3) – he held that Delta Re was entitled to interest as claimed at the rate of 15% per annum under the English Insolvency Act.

The appellant appealed on the ground that as he correctly found, and it was agreed on all sides, that New York Law was the proper law in respect the Letter of Credit, the Learned Chief Justice erred in applying English/Cayman Law to decide the question of whether the sums payable under the Letter of Credit formed part of the liquidation estate of Transnational.

Now the Learned Chief Justice having found that New York Law was the proper law of the contract, he expressed the opinion that "a letter of credit" is a form of security by way of a performance guarantee for the sum provided but enforceable according to its terms – "both as a matter of Cayman Islands Law and New York". Specifically, he accepted the opinion of Daniel Hargraves, Delta Re's expert, thus:

> **" The leading case seems to be in In Re Compton Corp. 831 F 2 Ed. 586 (5th Circuit 1987). In that case the United States Court of Appeal for the 5th Circuit declared as a matter of settled law the principle that letters of credit are not property of a bankrupt's estate but rather belong to the beneficiary subject to the satisfaction of its conditions."**

Notwithstanding, he went on to hold that the Letter of Credit in the attendant circumstances, namely, the intervention of the liquidation proceedings of Transnational, was caught up in the following provisions of the Company Law of the Cayman Islands, Section 100, which reads:

> **" When an order has been made for winding-up a company no suit, action or other proceeding shall be proceeded with or commenced against the company except with the leave of the court and subject to such terms as the court may impose."**

However, after considering dicta in **Moor v. Anglo Italian Bank [1879] 10 Ch. D 681,** amongst other cases, he concluded expressly that:

> **" These were cases in which foreign domiciled creditors were recognized by the English courts as having had the right to proceed to recover in the courts of their respective domicils, the debts owed to them by way of security over assets of the insolvent English debtor located there."**

The Learned Chief Justice expressly recognized a "conflict of laws" arising when he said:

> "… equally established however as a matter of English law, is the rule – to be rationalized with that just mentioned – that

creditors will not be allowed to proceed against assets which properly remain within an English insolvency estate, so as to strip the estate of those assets, irrespective of where those assets may be located. And creditors who succeed under the laws of their own foreign jurisdictions to recover against such assets must account for them if they subsequently also seek to prove in the English liquidation.

To my mind – and for reasons which follow – this is the rule which most directly applies to the letter of credit"

[Emphasis supplied]

For this principle of English Law, he relied on the dicta of **Lord Chancellor, Earl Cairns,** in **Blanco de Portugal v Waddell [1879-80] 5 App. Cas 161 [the Waddell's** case], which states:

" The terms are laid down by a decision of your Lordship's House in the case of Selkrig v Davies (Dow. 230), the terms are perfectly clear that a person who after having proved under a foreign bankruptcy, claims to prove in a bankruptcy of the same debtor in England, he may do so, but he must do so upon the terms of bringing in, for the purpose of dividend, the sum which he has received abroad. As was said by Lord Eldon, "It has been decided that a person cannot come in under an English commission without bringing into the common fund what he has received abroad" and Lord Eldon goes on to point out, what is obviously the case, that a creditor, because he happened personally to be in England, would not be obliged to bring the sum in to common fund – he

> **might keep it if liked – he might ignore the English bankruptcy altogether if he pleased, but if he did not ingore it, if he sought to have some benefit from it, then, on the principle that he who asks for equity must do equity, he must bring into the common fund that which he has already received in respect of the obligations of the same debtors".**
>
> [Emphasis supplied]

Now despite the generality in tenor of the passages emphasized above, the following lines in the headnote limited the application of the dicta to similar circumstances:

> **"Where traders possess two properties, one situated in this country, and there has been a petition for adjudication here, followed immediately, in point of dated, by proceedings in insolvency abroad, and the foreign Court takes possession of the foreign property, as under a cessio bonorum, and employs it in paying the foreign creditors a dividend, such creditors cannot afterwards prove under the English adjudication, except on the condition of first accounting for what they have received abroad."**

These circumstances are distinguishable from those of the instant case where there was a single liquidation proceedings in Cayman and the claim in New York was made pursuant to the Letter of Credit.

The Learned Chief Justice, however, sought to bring the Letter of Credit within the ambit of the principle by referring to the following Clause therein:

> **"Payment under this standby [later amended to include the word irrevocable] letter of credit will be made by us within three (3) banking days of receipt of a demand for payment from the Commissioner accompanied by the following documents:**
>
> **a. A certified copy of a judgment of the United States District Court for the Southern District of New York - - in favour of the Commissioner [Delta Re's claim was brought in the name of its liquidation commissioner] and against Transnational."**

and continued: -

> "Without the satisfaction of that condition and therefore without Delta Re having moved to obtain and enforce the default judgment, the letter of credit could not have been drawn down and enforceable as security.
>
> I conclude therefore that I should regard the sums which is covered as having been part of the assets within the liquidation estate of Transnational when drawn down by Delta Re. Delta Re having had notice of the liquidation when it moved for default judgment, I also conclude that it is deemed to have had notice that those sums were impressed with the statutory trust which now obliges the liquidation to discount them for the purposes of dividend declaration."

Accordingly, the pivotal question is whether or not the Letter of Credit falls within the following exception to the principle in the **Waddell** case as described with clarity in **Fletcher's Law of Insolvency [1990 E5] p. 567:**

> **"It should be emphasized however that the principle of surrender into hotchpot as a precondition to the creditor's eligibility to lodge proof does not apply to the realization of bona fide, pre-existing securities against the bankrupt's foreign assets, valid according to the law of the situs of the assets: such a creditor may prove for the balance of his claims against the bankrupt without being obliged to surrender his security, although he must of course account for and give for what he has received."**

Now the nature and advantages to a beneficiary of a Letter of Credit was emphasized by **Lord Denning** in **Power Curber International Ltd. v. National Bank of Kuwait SAK [1981]** (the Kuwait Case) **3 ALL ER** at page 612: -

> **"... I must draw attention to the importance of letters of credit in international trade. They are the means by which goods are supplied all the world over. It is vital that every bank which issues a letter of credit should honor its obligations. The bank is in no way concerned with any dispute that the buyer may have with the seller ... A letter of credit is like a bill of exchange given for the price of goods. It ranks as cash and must be honored."**
>
> [Emphasis supplied]

Appellants' Counsel submitted that on the basis that the proper law of the Letter of Credit was New York Law and also the Law of the **Situs** and on the trial Judge's acceptance of the opinion of Hargraves, the letter was clearly within the

exception of within the exception of the principle in **Waddell's** case. However, assuming for the purpose of argument that the approach of the Learned Chief Justice was open to him, the intervention of the insolvency proceedings by Transnational could not defeat the purpose for which it was created, having regard to the nature of a Letter of Credit as described by Lord Denning in the **Kuwait** case. In support, he referred to **Re Ford [1900] 2 QB** 211, the headnote reads:

> **"Money paid into court under the Rules of the Supreme Court, 1883, Order xiv, for leave to defend, must be treated as money paid in to abide the event, and is a security to the plaintiff for the sum for which he may obtain judgment at the trial; and if the defendant becomes bankrupt before the trial the money must remain in court until "the event" is decided by the trial of the action, if that is to be tried, or by adjudication upon a proof by the plaintiff in the bankruptcy."**

Appellants' Counsel sought support in this case by equating: (i) a payment into Court with a Letter of Credit; and (ii) "to abide the event" with the condition attached to the Letter of Credit.

The Learned Chief Justice distinguished **Re Forde** on the basis that a Letter of Credit is not to be equated to a payment into Court.

Be that as it may, however, from the circumstances in which this Letter of Credit was given as set out (post), more directly in point is the other case referred to

by Appellants' Counsel, namely, **Re West Cumberland Iron & Steel Company [1893] 1Ch.D 713**. The headnote reads:

> **"Where, prior to the commence of the winding-up of an English company, a creditor has arrested property of the company in Scotland jurisdictionis fundandae causa, and has followed this up by bringing an action in Scotland, and making an arrestment on the dependence of the action, he has become, subject to his obtaining a decree in such action, a secured creditor, and will not be restrained from continuing his action.**
>
> **In such a case the judgment or decree drawn back to the date of the arrestment on the dependence and the security thereby obtained applies to the debt subsequently established.**
>
> **If the arrestments are impeached on the ground that they were obtained on a misstatement of facts, this is only a ground for the recall of the process by the Scotch Court, and, until so recalled, The English winding-up Court will treat the process as having been validly issued."**

Since the date Transnational went into liquidation was to the Learned Chief Justice, the determinant factor, in my view, the circumstances under which the Letter of Credit was given and its chronology to the entry of Judgment are relevant in determining the effect of the interim liquidation of Transnational on the Letter of Credit. In May, 1989, Delta Re (in liquidation) instituted proceedings against Transnational in the New York Courts to enforce claims for reimbursement for losses incurred and had to be paid. Transnational counter-claimed seeking Recession of the Agreement for alleged fraudulent misrepresentation and non-disclosure of Delta Re's insolvency. Delta Re applied to the court seeking an Order against Transnational (a foreign litigant) for security in a sum to cover the losses claimed.

After a contested hearing, Delta Re's application was granted and pursuant to the Order of the Court of July 20, 1990, the Letter of Credit by Barclays Bank PLC Cayman was issued. The original letter was described as a "standby" but on Counsel's advice by an amendment of November 26, 1991, "standby" was purposefully replaced by "irrevocable". It was manifest that the Letter of Credit was a guarantee payment to Delta Re on the conditions therein being met.

Respondent's Counsel sought to support the Chief Justice's finding by submitting that as a conditional guarantee, should the conditions not be fulfilled, either the right of indemnity between the guarantor and the principal debtor that arises as a matter of law does not arise and or in this case that the underlying value or "bundle of rights and equities represented by the Letter of Credit (being the right to receive the rebate from Barclays Banks PLC of funds deposited by Transnational to support the Letter of Credit) were part of the Statutory Estate of Transnational. To conclude, the right to receive back the funds should the Letter of Credit not have become unconditional or otherwise lapsed was an asset of the Statutory Estate

of Transnational enuring for the benefit of all its creditors when the Appellants pursued to execution the New York action."

There is no merit in this submission which rests upon the illusory hypothesis as in fact the conditions for enforcement were in fact fulfilled. In that regard, it is of interest to note that in May, 1993, Barclays PLC, Cayman, indicated an intention to prematurely cancel the Letter of Credit. But this was not merely countered but forestalled by the default Judgment of May 5,1993. In subsequent proceedings of June 30,1993, this Judgment was held conclusive and non-appealable and an Order was made that the Clerk of the Courts (Southern District of New York) release the letter of Credit to Counsel for the Liquidator for re-delivery to Barclays.

As the headnote in the **Kuwait** case (p.608) accurately summarised:

> **"Because letters of credit were established as universally acceptable means of payment, equivalent to cash, in international trade and commerce on the basis that the promise of the issuing bank to pay was wholly independent of the contract between the buyer and the seller and that therefore the issuing bank would honor its obligation to pay regardless of any dispute between the buyer and seller ------."**

It is a good rule that works both ways. Just as the Bank would not be concerned with the arrangements between Delta Re and Transnational so in like manner Delta Re would not be concerned with the arrangements between the Bank and Transnational. It is not unusual for the Letter of Credit to contain contingent conditions. Regards must be had to the realities. When the conditions therein are met as in the circumstances of this case, Delta Re would look directly to the Bank

to honor the Letter of Credit and it would be no concern to Delta Re as to the arrangements between the Bank and Transnational as to the Letter of Credit – whether the Bank had in possession funds to effect a set-off or realizable assets pledged for the purpose. So whether as under New York Law, the property in the Security passed on creation of the Letter of Credit to the beneficiary or the approach of the Learned Chief Justice is applied, on the basis of the nature of a Letter of Credit as described in dicta above in the **Kuwait** case, it is to ignore the realities to hold that the intervening insolvency of Transnational could defeat the purpose for which the Letter of Credit was created and issued in accordance with the directions of the New York Court.

For these reasons, Delta Re would be entitled to realize the Security in the letter of Credit and in addition prove for the balance of its claim in the liquidation of Transnational and, accordingly, not obliged to bring the amount realized on the Security into hotchpot. Accordingly, this Ground of Appeal succeeds and the Appellants' appeal is allowed.

The Respondent in the Cross Appeal against the award of the claim for IBNR submitted that the Learned Chief Justice fell into error: (i) in finding that the IBNR provision was a contingent liability under Rule 11:13 of the English Insolvency Rules (even if applicable to the Cayman Jurisdiction); and (ii) that whilst correctly stating that the effect of the Insolvency Clause as a matter of New York Law (being governing law of the contract) that its effect was to convert the contract of insurance from:

(a) one of indemnity into one of liability i.e.: one in which the reinsurer no longer simply indemnifies against actual claims paid but agrees to meet its prorated share of all liabilities of its reinsured.

Thus the reinsurer is obliged to pay the reinsured based on the liability of the reinsured, not based on whether the reinsured has actually paid out on those liabilities"; and

(b) whilst correctly noting that "an IBNR provision is unlikely to have the same value as a specific claim to which it is intended to correspond" the Learned Judge was incorrect to treat an IBNR provision (being in any event, an actuarially calculated estimate of potential future liabilities) as a claim to which the insolvency clause attached and thereafter as a debt admissible to prove in the liquidation of Transnational. The Learned Judge's approach has, in effect, put the Appellants in a better position than they would have been had Transnational not been placed in liquidation. Such a result goes against the premise of insolvency legislation that all creditors are to be treated equally".

Dealing with this aspect of the case, the Learned Chief Justice correctly defined the nature of IBNR's claims, thus:

> "... it is inherent in the nature of insurance business that certain losses may have been incurred but not yet been reported. Typical examples are medical negligence claims. IBNR reserves – as Mr. Cleaver, one of the joint liquidators of Transnational describes them in his affidavit- are general

> provisions for insurance claims. They do not relate to specific ascertained claims. Such provisions are required where there is a delay in the reporting of claims beyond the accounting year in which events of loss take place. Where there is a claim development history for the type of risk insured, provisions can be actuarially assessed based upon assumptions of future developments and the extrapolation of his historical results. Due to uncertainty inherent in assessing future reported losses, an IBNR provision is unlikely to have the same value as the specific claims to which it is intended to correspond. In that respect, observes Mr. Cleaver, it is no different from any other general provision".

He concluded that IBNR claims would come within the definition of debt in the Insolvency Rules –"whether the debt or liability is present or future, it is capable of being ascertained by fixed rule or as a matter of opinion – Rule 13.12. This statement of principle is unchallenged".

There remain the consistent contending submissions from either side. The Liquidators having accepted that under Cayman Law, they were obliged to estimate and make appropriate provisions for contingent or future liabilities, nevertheless contended that consideration of IBNR claims should be deferred until all other claims are met and only such IBNR claims as "become crystallized into actual claims". The Respondents' argument, on the other hand, was to the effect that while the liquidation of Transnational was governed by Cayman Law, in construing

liabilities arising under the Agreement, New York Law was applicable – **Dicey and Morris Conflict of Laws – 11th Ed. Vol. 2, Rule 180.**

The Learned Chief Justice had expert opinion on New York Law – the proper Law of the Agreement – from Mr. Hargraves for Delta Re and Mr. Primps for the Liquidators. In his Judgment he found that the experts agreed that the effect of Article XVI – the Insolvency Clause – which reads:

> " **"reinsurance shall be payable directly to [Delta Re] or its liquidator - - on the basis of the liability of [Delta Re] without diminution because of the insolvency of [Delta Re] or because of the liquidator - - of [Delta Re] has failed to pay all or a portion of any claim"."**
>
> [Emphasis supplied]

taken by itself – which in this context means without reference to the "follow the fortunes" provisions of Article VII – is to convert the contract of insurance from one of indemnity into one of liability, i.e.: one in which the reinsurer no longer simply indemnifies against actual claims paid but agrees to meet its prorated share of all liabilities of its reinsured. Thus the reinsurer is obliged to pay to the reinsured based on the liability of the reinsured, and not on whether the reinsured has actually paid out those liabilities.

He considered (i) the following extract from the leading American text – **R. Strain, Reinsurance at pp. 90-92 [1994]:**

> " **"Insolvency Clauses are now standard provisions in all reinsurance contracts because they are**

required by the statutes of several states ----. Their history dates back to the depression of the 1930's when several insurance companies became insolvent and were unable to make full payments on the claims held against them. Some reinsurers at the time took the position that since an insolvent ceding company did not pay 100 cents on the dollar for each claim, the reinsurer should indemnify the company only to the extent that the company made actual payments on each claim. This meant that if the company paid say only $1,000 on a $5,000 claim, the reinsurer would pay only its proportionate share of the $1,000 payment. As a result of this situation, New York passed in 1939 controlling legislation (section 77 of the New York Insurance Law ----) [now section 1308]. <u>That law required, in order for the ceding company to take credit on its Annual Statement for the reinsurance on its books</u>, the reinsurer must make full payment to the liquidator of the <u>company for the reinsurer's liability</u> under the <u>reinsurance contract, without diminution</u> because of <u>insolvency of the company".</u>"

[Emphasis supplied]

and (ii) the New York Court of Appeal's decision in **<u>Kemper Reinsurance Company</u> <u>v</u> <u>Covuran</u> 79 N.Y. 2d 353 [1972]** " that the effect of an insolvency

clause in a reinsurance contract is to alter the indemnity nature of the contract to one of liability; and (iii) the following statement from **R. Strain** at page 96:

> **"The Insolvency Clause requires that the reinsurer's indemnification be based on the ceding company's liability, not on the Liquidator's payments, which are likely to be less."**

In my view, he correctly concluded that the decision of the New York Court of Appeal is correct.

Notwithstanding, Mr. Primps argued that the "follow the fortune" clause was against this interpretation. Relying on two New York cases – **Unigard Sec. Ins. Co. v North River Ins. 762 F Supp. 566 (S.D.N.Y) [1991]** and **Aetna Cas. and Sur. Co. v Home Ins. Co. 882 F Supp 1328 [1995]**, he submitted that on general principles of New York Law a contract should be interpreted so as not to render any provision meaningless which would be the result of adopting Hargraves' argument. The Learned Chief Justice quite properly distinguished these cases as not being concerned with cases of insolvency.

The Learned Chief Justice held that as a matter of the Law of Cayman as well as New York, such estimates are properly to be taken and provided for within the liquidation regime and estimates of them are provable in the liquidation on proper actuarial assumption that they will crystallize. Further "to deny IBNR provisions on the premise that Delta Re's liquidation may never pay those provisions out to the notional claimants for whom they are provided would be to refute the actuarial assumptions which are otherwise to be regarded as valid. In that regard, Delta Re's Dividend Payment Plan provided for possible future dividends to

meet IBNR claims which may crystallize in the course of its winding-up and so may become actual paid losses."

The submissions of both Counsels on appeal were of similar tenor and substance as before the Learned Chief Justice who dealt with them diligently and I can find no fault in his reasoning and conclusion. For these reasons, I would dismiss the Respondents' Cross-Appeal.

The Respondents also appealed against the Learned Chief Justice's Award of Pre-liquidation Interest.

The claim for interest, as elucidated by Delta Re's Counsel at the trial, was in relation to the paid-loss claims which had arisen and already admitted or paid by Delta Re's Liquidators and had been submitted quarterly to Transnational (before liquidation) for payment. As those claims submitted were not paid within sixty days as required by the Agreement, interest became payable as pre-liquidation interest.

The Learned Chief Justice considered the claim well-founded and applied the U.K. Insolvency Rules 4:93 which he held was applicable by virtue of Grand Court Rules, Order 102, Rule 17. Rule 4.93 reads:

> **" 4.93(1) where a debt proved in the liquidation bears interest, that interest is provable as part of the debt except in so far as it is payable in respect of any period after the company went into liquidation.**

> **4.93(2) In the following circumstances the creditor's claim may include interest on the debt for periods before the company went into liquidation, although not previously reserved or agreed.**
>
> **4.93(3) If the debt is due by virtue of a written instrument, and payable at a certain time, interest may be claimed for the period from that time to the date when the company went into liquidation.**
>
> **4.93(4) The rate of interest to be claimed under paragraphs (3) and (4) is the rate specified in section 17 of the Judgments Act 1838 on the date when the company went into liquidation."**

Having considered the Insolvency Rule 4.93, and the case of **Re Humber Ironworks and Shipbuilding Company 1869 LR CH App 643**, and the English Legislation dealing with interest, he concluded that notwithstanding that Article VII of the Agreement had no express provision for interest, interest was "payable for the period up to the 16th January, 1993 (date of Transnational Insolvency), and at the rate of 15% per annum" as prescribed by the U.K. Judgment Debts (Rate of Interest) Order 1985.

On this finding the Respondents' Grounds of Appeal complained of error on the part of the Learned Chief Justice's thus:

(1) (a) in applying Rule 4.93 of the English Insolvency Rules 1986; (b) finding that this Rule provided for the payment of interest; (c) in applying section 149 of the Companies Law [1995] Revision; and

(2) alternatively in applying the U.K. rate of interest instead of the rate of interest provided by Cayman Legislation.

Now **Order 102 Rule 17** of the Grand Court Rules states:

> " " **Unless and until any rules are made under Section 173 of the Law, all application to the Court made pursuant to Section 48, 78, and Part V of the Law and all proceeding concerning or arising out of the liquidation of any company shall, so far as practicable, be made in accordance with the Insolvency Rules … in so far as such rules are not inconsistent with the [Companies] Law or such other rules as may be applied to the proceeding in question"."**
>
> [Emphasis supplied]

In support of his main Ground of Appeal, Respondents' Counsel submitted that the above Order merely adapts those parts of the Insolvency Rules that relates to the procedure on the basis that the word "proceedings" is defined in

Order 1, Rule 7, of the Grand Court Rules as 'including "any cause or matter or a step in any cause or matter".'

In this submission Respondents' Counsel has made the error of interpreting "including" as limiting the meaning of the word "proceedings" whereas it is a well-known canon of construction that the word "include" in a definition is intended to widen the meaning of the word to include matters that may not be within the ordinary meaning of the word.

It is enough to say that the award made by the Learned Chief Justice, limited as it is in his Judgment, was well within the principle in the **Humber Iron Works** case as summarized in the following from the headnote at p. 643.

> " **In the case of an insolvent company which is being wound up, creditors whose debts carry interest are entitled to dividends only upon what was due for principal and interest at the winding-up, -------".**

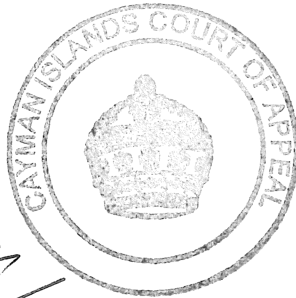
Insolvency proceedings are occasional and special with proceedings and Procedural Rules appropriately peculiar. Therefore, the legislative intent of Order 102, Rule 17, would be to incorporate the English Insolvency Rules subject only to the express reservations and limitations in the passage emphasized. Within those reservations are the relevant Cayman Legislation – The Judicature Law (1995 Revision) and the Judgment Debts (Rate of Interest) Rules 1995. By these Rules, the rate of interest at the date of Judgment would be 7 $^{3}/_{8}$ percent per annum. Therefore, Respondents Counsel's alternative submission that the rate of interest should be as provided by Cayman Legislation, is sound. Accordingly, subject to this variation, I would affirm the Order for the Interest of the Learned Chief Justice.

For these reason I would allow the Appellants' Appeal and dismiss the Respondents' cross-appeal.

Cost of the Appeal to be the appellant's to be agreed or taxed.

ZACCA, P. :

I agree.



COLLETT, J.A. :

I agree.