#947
IN THE CAYMAN ISLANDS COURT OF APPEAL
HOLDEN AT GEORGE TOWN, GRAND CAYMAN

CAUSE # 40/94
MISC. # 9/95
MISC. # 3/96

BEFORE: THE RT. HON. MR. JUSTICE EDWARD ZACCA, P.C. PRESIDENT
HON. MR. JUSTICE J.S.KERR, JUDGE OF APPEAL
HON. MR. JUSTICE GERALD COLLETT, JUDGE OF APPEAL

BETWEEN FINSBURY BANK AND TRUST COMPANY (IN LIQUIDATION)

APPELLANT

AND THE ATTORNEY GENERAL OF THE CAYMAN ISLANDS

RESPONDENT

Mr. Ramon Alberga with him Mr. Alan Turner of W. S. Walker & Co. for the appellant
Mr. Robin McMillan, Crown Counsel for the respondent

5th August and 6th December 1996

KERR J.A. JUDGMENT

This is an appeal by the joint liquidators of the Finsbury Bank and Trust Company ("the Company") against the judgment of Schofield, J, dated October 24, 1995, in which he ordered that the proof of debt filed by the Solicitor-General on behalf of the Government of the Cayman Islands in the sum of CI$124,448.39 in respect of fees paid by the government to Mr. Theodore Bullmore ("Bullmore") appointed by the Governor as "Receiver" pursuant to section 14 (1) (v) of the Banks and Trust Companies Law 1989, having been presented and rejected by the appellants, be admitted.

Bullmore's appointment dated July 26, 1993, was accompanied by the "Directions" which in its operative parts reads:-

> "The Receiver is directed:-
>
> (1) forthwith to enter upon the premises of the licensee and and take control of affairs the licensee, business, premises, property, assets, books, records and all other things whatsoever and wheresoever situated so as to preserve the assets of the licensee and to protect the interest of the depositors and other creditors;
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> (2) not to accept any further deposits, or incur further liabilities, other than those necessary for the day to day management of the affairs of the licensee, until further direction;
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> (3) Not to make any disbursement or payment of any money held by the licensee or to the order of the licensee, whether on current savings, deposit or any other form of account, and not to part with any gold or securities or make any changes in the persons to whose credit any sum stands or to whose order any gold or security is to be held or make any payments other than those necessary for the day to day operation of the business of the licensee, without first obtaining the consent of the Inspector of Financial Services.
>
> (4) as soon as possible to prepare and furnish a report to the Governor and to the Inspector of Financial Services of the affairs of the licensee and of his recommendations thereon."

On July 24, 1993, the Governor (meaning the Governor in Council) filed a petition for the winding up of the Bank. The petition was opposed and the Bank filed an action against Bullmore for trespass and an injunction restraining him from carrying out any activities at the Bank's offices. The intended incidental appointment of

Bullmore as liquidator was successfully opposed on the grounds of inherent conflict of interest and by an order of Harre C.J., dated August 10, 1993, with consent of the parties, the appellants were appointed as joint official receivers and managers of the Company and the action against Bullmore was withdrawn. At a meeting of the shareholders the Company was placed in voluntary liquidation on February 11, 1994 and by an Order of the Court of the 14th idem, the liquidation was ordered to continue under the supervision of the Court and with the same liquidators.

In the interim, Bullmore had presented two reports to the Governor who on the basis of these reports had revoked the licence of the Company. For fees incurred and disbursement, Bullmore tendered to the Company two bills. The debt claimed was the aggregate of these bills and for which amount the Governor had given an indemnity to Bullmore. The reasons for the liquidator's rejection of the claim were accurately summarised by Schofield, J. in his judgment thus:

> (1) Mr. Bullmore's actions were unauthorised and improper, because he failed to seek powers from the Grand Court;
>
> (2) the Governor had no power to grant powers to Mr. Bullmore as an appointee under section 14 (1) (d) (v) of he Banks and Trust Companies Law 1989 and under section 18 of the Bankruptcy Law and such powers as the Governor purported to grant were void and of no legal effect;
>
> (3) in paying Mr. Bullmore's fees and expenses the Government of the Cayman Islands acted as a volunteer and, as such, is barred from recovering the sum

paid from the Company.

It was conceded by the Respondent's Counsel that Bullmore did not seek directions from the Courts as to the powers to be exercised on his appointment.

The resolution of the questions of law raised by the appellants before the learned trial Judge involve interpretation of the relevant statutory provisions, namely, section 14 of the Banks and Trust Companies law and section 18 of the Bankruptcy Law, the provisions of which read:

> "14. (1) Whenever the Governor is of the opinion that a licensee -
>
> (d) has failed to comply with a condition of its licence he may forthwith do any of the following -
>
> i)
> ii) (do not apply)
> iii)
> iv)
>
> (v) at the expense of the licensee, appoint a person to assume control of the licensee's affairs who shall mutatis mutandis have all the powers of a person appointed as a receiver or a manager of a business appointed under section 18 of the Bankruptcy Law" (Revised); and
>
> (vi) (does not apply)

and section 18 of the Bankruptcy Law (Revised):-

> "18. At any time after a petition has been filed the Court may order that the Trustee become the receiver or manager of the property

> or business of the debtor, or of any party thereof, and the Trustee shall thereon enter upon and act in the performance of his office in relation to such property or business at such time, and in such manner and to such extent, as the Court may from time to time direct, and if directed by the Court, and so far as the nature of the case will admit, do anything which might be done by Trustee after and absolute order for Bankruptcy under this Law, and shall, in relation to and for the purpose of acquiring or retaining possession of the property of the debtor, and in addition to any powers given to him by this Law, be in the same position in all respects as if he were a receiver appointed by the Grand Court, and the Court may, on his application enforce such acquisition and retention accordingly."

The learned Judge rejected the contention of the respondent's counsel that the conduct of a receiver or manager appointed under section 14 is governed, not by the Court by according to ordinary common law principles and performed his duties in the same manner as an extra - curial receiver or manager and accepted the arguments of appellant's counsel in support of reasons (1) and (2) for rejecting the claim as indicated, inter alia, in the following passages in his judgment --- "from the moment of his appointment which does not require a prior

petition to the Court, the receiver or manager derives his powers in the same manner as a Trustee in Bankruptcy i.e. he cannot act to any extent or in any manner or indeed enter upon his appointment, without direction of the Court. That, in my judgment, comes from the clear wording of section 18 of the Bankruptcy Law" and that Bullmore "acted in error in failing to seek the directions of the Court".

Now as regards the liquidator's third reason for rejecting the claim, Schofield J, after quoting with evidence approval dicta of Scarman, L.J. in Owen v Tate [1976] 1 Q.B. at pp 402 and 411 - 12 and after apparently careful consideration of the argument from both sides, the circumstances of the appointment and section 14 of the Banks and Trust Companies Law held that had Bullmore made prior application to the Court there was no suggestion that he would not be given the powers he exercised; that had he made immediate retrospective application for ratification of his actions there was no suggestion that the Court would not have ratified his actions. On the basis of this approach he made the order for admission of the claim.

Although it is against this unfavourable finding that the appeal was filed, the respondent's notice contending as it does that the learned Judge erred in holding that notwithstanding his appointment by the Governor Bullmore had no power to perform as he had not sought and obtained from the Grand Court the necessary directions, rendered the determination of this question fundamental to the appellants' appeal.

In dealing with the primary question and en route to the conclusion

adumbrated above, the learned trial Judge had said:

> "In the case of an appointment under section 18 of the Bankruptcy Law, the appointment of the Trustee is by the Court after a petition has been filed but from the moment of his appointment. His powers of performance derive from the Court and he cannot act to any extent or in any manner without Court direction. Indeed he cannot enter upon his appointment without a direction from the Court. In the case of an appointment of a person who we may describe as a receiver or manager under section 14 of the Banks and Trust Companies Law the appointment is made by the Governor. No petition is necessary under section 14. However from the moment of his appointment, which does not require a prior petition to the Court, the receiver or manager derives his powers in the same manner as a Trustee in Bankruptcy i.e. he cannot act to any extent or in any manner, or indeed enter upon his appointment without the direction of the Court. That in my judgment, comes from the clear wording of section 18 of the Bankruptcy Law. This was the clear intention of the Legislature and to hold otherwise would be to do violence to the two sections under consideration. And who better to direct a receiver or manager in the performance of his powers than the Court which is well-versed in such functions? Furthermore I cannot see that this duty to exercise his functions under the direction of the Court by reference to section 18 of the Bankruptcy Law in any way conflicts with the receiver or manager's duty under the provisions of section 14 of the Banks and Trust Companies Law to report back to the Governor on issues relevant to the revocation of the licensee. The two duties sit comfortably together."

The submissions before us by Counsel for the appellant were consistent with those before the learned trial Judge. He submitted that the person appointed as receiver by the Governor under the provisions of section 14 of the Banks and Trust Companies Law, until he applied to the Court had no power at all. For the purpose of

construing section 14 the appointment is to be equated to a designation. The appointment does no more that a confer on the person named in the appointment the locus standi to make application to the Court to obtain his powers to act; that until he obtained those powers from the Grand Court he was powerless and impotent; The Order of the Court made on application is the aphrodisiac that made him potent and able to act. He is in a similar position as a Trustee in Bankruptcy who has no powers at all until the Court gives him powers (see section 18 of the Bankruptcy Law).

Thus, by apparently unfaltering steps, Mr. Alberga comes to the same conclusion that received the learned trial Judge's approval. But in doing so, counsel has chosen his own starting point, namely, that the appointment of Bullmore was no more than a designation. This is plainly not right. Under section 14 of the Banks and Trust Companies Law, the Governor is empowered whenever in his opinion that the circumstances described in sub-section (1) exist (here "the bank, as licensee has failed to comply with his condition of its licence") To make the appointment such as he did the expenses of the licensee "for the purpose of assuming control of the company's affairs" and by sub-section 3 the person so appointed was required from time to time to prepare and furnish reports to the Governor.

To those provisions appellant's counsel submitted that there might have been some merit in the argument that the appointment gave the appointee such powers as would be necessary to take control of the

affairs of the company had there been a full-stop after the word "affairs" in section 14 (1) (v) but the pronoun "who" followed by the other words were important and significant; they equated the appointee to a trustee in bankruptcy and the Trustee in Bankruptcy under section 18 of the Bankruptcy Law has no powers until he had made application to the Court.

However, to the contrary, it seem more in keeping with grammatical construction to regard the clause after the relative pronoun "who" as a co-relative addition rather than in derogation of what was positively predicted in the primary clause.

Although it was not pressed in argument, the learned trial Judge was referred to the words "mutatis mutandis" in section 14 (1) (v) of the Banks and Trust Companies Law and the definition of those words in Black's Law Dictionary 5th Edition. In turn, the Judge quoted with evident approval the following:

> "With the necessary changes in points of detail, meaning that matters or things are generally the same, but to be altered when necessary as to names, offices and the like. Houseman v Waterhouse, 191, APP. Div. 850, 182 N.Y.S. 249, 251."

This passage clearly exposes the limitations on the use of the phrases and, therefore, would be inadequate in reconciling the provisions of the incorporated section with the legislative intent of the related provisions of section 14 (1) of the Banks and Trust Companies Law or determining the effect the incorporated section would have on those

provisions.

Now section 14 (1) (v) is clearly an example of legislation by incorporation - "The effect of bringing into a later Act by reference, sections of an earlier Act, is to introduce the incorporated sections of the earlier Act into the later Act as if they had been enacted in it for the first time" - Craies on Statute Law, 7th Edition 223.

This short-cut method of drafting has its drawbacks. Of this type of "Referential Legislation", Sir Allison Russell, K.C., in his legislative Drafting and Forms, 4th Edition at p. 69 commented thus:

> "It is almost impossible to apply provisions of an Act dealing with one matter to the provisions of another Act dealing with another matter without doubts arising in the application ---. In this case it is still more important that the draftsman should set out the sections which he desires to incorporate at length rather than leave the matter in obscurity".

The present case illustrates how this method of legislation lends itself to debatable interpretations. Assuming for the purpose of argument that in keeping with the dictates of the statute, on appointment, Bullmore assumed control of the company, what does that involve, and what additional powers are contemplated by the incorporation of section 18 of the Bankruptcy Law?

In the Court below, in support of his arguments under absolute necessity of Bullmore obtaining directions from the Court before he could act, the liquidator's counsel contrasted English legislation of

similar intent, namely, section 287 of the Insolvency Act, 1986. Therein the Official Receiver in England acts as receiver and manager of the Bankruptcy estate between the making of the Bankruptcy Order and the time at which the bankrupt's estate vests in the Trustee. So acting his function is to protect the estate and for that purpose he has the same powers as if he were so appointed by the High Court. But under section 287 (2) (b) of the Act he has specific powers and the Secretary of State has power to make particular rules relating to a receiver and manager appointed under section 287. Section 18 of the Bankruptcy Law of Cayman on the other hand does not define in detail the powers of managers and receivers but it is left to the Grand Court to determine the extent of the powers to be exercised. Having regard to the specific subject matter of the Banks and Trust Companies Law for avoidance of argument section 14 should have specifically set out the extent of the powers on appointment thereunder.

Notwithstanding, the interpretation should lean against conflict in favour of reconciliation. Accordingly, the implied intention of the incorporation was to import provisions that are applicable, appropriate and of assistance in carrying out the legislative intent of the later Law. The incorporation of provisions in conflict with express terms or in derogation of the legislative intent should be as infelicitous and unhelpful as transfusing a patient with blood of an incompatible group. The obvious intent of the relevant legislation in the Banks and Trust Companies Law is to confer on the Governor Extra-curial power in the circumstances described to act expeditiously in the public interest. The time frames, in relation to certain

actions, support this view. In that regard, an example of extra-judicial review and remedy is to be found in subsection (2) which reads:

> "Notwithstanding section 21 (1), a licensee may, within seven days of the decision, apply to the Governor for a reconsideration of his decision to revoke a licence under paragraph (i) of subsection (1)."

Section 21 (1) gives a right of appeal against any decision of the Governor.

Applying the liberal approach of reconciliation to section 18 of the Bankruptcy Law, the receiver and manager appointed thereunder by the Court is a creature of the Court and his powers as such are conferred by the Court but this cannot be used to derogate from the express power of the Governor's appointee "to assume control of the licensee's affairs". There is support for this approach by the following quoted statement from Craies on Statute Law - 7th Edition p. 98:

> "If the choice is between two interpretations, the narrower of which would fail to achieve the manifest purpose of the legislation, we should avoid a construction which would reduce the legislation to futility and should rather accept the bolder construction based on he view that Parliament would legislate only for the purpose of bringing about an effective result"

per Lord Simon in Nakes v Doncaster Amalgamated Colliers Ltd [1940] A.C. at p 1022. From careful analysis of section 18 of the

Bankruptcy Law, it will be seen that after the sentences dealing with the powers of the Grand Court, there is implied recognition that a Trustee, after an absolute order of Bankruptcy, has powers independent of those conferred on his appointment as Receiver or Manager. The same implication should be extended to appointee under section 14 (1) (v) of the Banks and Trust Companies Law.

For the reasons set out above, Bullmore would be entitled for work done and expenses reasonably and necessarily incurred as were attendant and incidental to his assuming control of the affairs of the Company and rendering the Report as required by the provisions of section 14 of the Banks and Trust Companies Law.

Notwithstanding the learned Judge's finding that Bullmore erred in not seeking the directions of the Court and that he had no power to perform as he did in the absence of such directions, he admitted the claim presented by the applicant. In doing so he relied, inter alia, on the dicta of Scarman L.J. in Owen v Tate [1976] 1 Q.B 402 (post) and held:

> "Section 14 of the Banks and Trust Companies Law states that the appointment of a receiver or manager is "at the expense of the licensee". Had he made prior application to the Court there is no suggestion that he would not been given the powers he exercised; had he made immediate retrospective application for ratification on his actions there is no suggestion that the Court would not have ratified his actions. In all the circumstances I am minded to order the joint Liquidators to pay the fees incurred, and I do so order."

Counsel for the appellants contended in effect that the learned Judge having found that Bullmore in not seeking the directions of the Court had no power or authority to act; the bank was not liable to pay his fees as claimed and, therefore, erred in making the order he did. In that regard, the claim was not recoverable either on an indemnity basis or as quantum meruit. Like the learned Judge and counsel for the respondent he found that helpful dicta in Owen v. Tate.

Now to have come to the conclusion that all power must come from the Court the Judge had resorted to rationalizing as in the following passages:

> "And who better to direct a receiver or manager in the performance of his powers than the Court which is well-versed in such functions?
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> Nor need the Court's involvement, clearly intended as it was by the Legislature, lead to embarrassment or delay. It is not beyond the wit of the lawyers, as they have to do in so many cases, once an appointment is made to prepare a speedy application for directions to be put before a judge in Chambers."

However, in the end when he came to deal with the appointment of Bullmore, the validity of which had not been challenged, he clearly was of the view that the justice of the case demanded that the licensee Bank was liable to pay for the fees and expenses incurred and the quantum of the claim should be as in the indemnity.

In support of his contention that in the circumstances the claim was

not maintainable as an indemnity, appellant's Counsel submitted that it did not include the essential elements of an indemnity as identified in Owen v. Tate (Supra) at p. 407:

> "When one turns to the second general rule, namely, the rule that were a person is compelled by law to make a payment for which another is primarily liable he is entitled to be entitled to be indemnified, notwithstanding the lack of any request or consent, one again finds that the law recognises exceptions. This rule has been subjected to a very careful treatment in Goff and Jones, the Law of Restitution [1966], p. 207. The authors say, after stating the rule in general terms:
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> " "To succeed in his claim, however, the plaintiff must satisfy certain conditions. He must show (1) that he has been compelled by law to make the payment; (2) that he did not officiously expose himself to the liability to make the payment; (3) that his payment discharged a liability of the defendant; and (4) that both he and the defendant were subject to a common demand by a third party, for which, as between the plaintiff and the defendant, the latter was primarily responsible."."

He submitted that in the instant case the words in section 14 (1) (d) (5) "at the expense of the licensee" could not possibly mean that the Bank would be liable to Mr. Bullmore for his fees whether or not he exercised proper powers. The trial Judge should have expressly found that Bullmore's work and actions were unauthorised and improper. There being no primary liability in the Bank, therefore, the Government cannot look at the Bank for reimbursement.

Now notwithstanding that, Scarman L.J. quoted with approval the essential elements of indemnity from the learned author's work (supra), he went on to state the apparently broad proposition relied on by Schofield J at p. 411-2:

> "In my judgment, the true principle of the matter can be stated very shortly, without reference to volunteers or to the compulsions of the law, and I state it as follows. If without an antecedent request a person assumes an obligation to makes a payment for the benefit of another, the law will, as a general rule, refuse him a right of indemnity. But if he can show that in the particular circumstances of the case there was some necessity for the obligation to be assumed, then the law will grant him a right or reimbursement if in all the circumstances it is just and reasonable to do".

On the question of quantum meruit, Mr. Alberga submitted that Bullmore had no contract with the Bank and the Bank did not acquiesce to what he did. The conferred no benefit on the Bank. On the contrary, his recommendations were destructive of the Bank.

Interesting though these arguments may be, the realities are that the liability with which are here concerned is a statutory imposition. The respondent's counsel likened it to taxes. Once the appointment is valid as stated earlier, the Bank would be liable to pay such expenses reasonably incurred as are attendant on or incidental to the appointee carrying out the purpose for which he was appointed. Avoidance can only arise where the licensee is insolvent. It is, therefore, but prudent for the appointee to seek some assurance from

the Governor who appointed him to the effect that in any event he will be paid and reasonable for he Governor to give such an assurance. However, the giving of an indemnity is the Governor's choice of form as there was no satisfactory obligation to do so. It cannot, therefore, per se determine what actions are incidental to the appointment and what are the reasonable expenses.

Bullmore, in addition to his two bills, submitted a list of his duties. The question whether or not what he did went beyond what was necessary to effect the purpose of his appointment was never considered. In the circumstances, the matter should be remitted to the Court below for a determination of that issue and the quantum to be awarded as consequential thereto. Subject to this I would dismiss the appeal. On the matter of costs, the appeal sought a critical review and interpretation of the relevant provisions of the Banks and Trust Companies Law and it was, therefore, in the public interest that an appeal on this question should be brought. In the circumstances, I would order no costs of appeal.

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JUDGE OF APPEAL

I concur.

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PRESIDENT

I concur.

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JUDGE OF APPEAL