

IN CHAMBERS

IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN
CAUSE NO:40/94

Handwritten signature
24-10-95

IN THE MATTER OF FINSBURY BANK & TRUST COMPANY (IN LIQUIDATION)
AND IN THE MATTER OF THE BANKS AND TRUST COMPANIES LAW 1989
AND IN THE MATTER OF THE COMPANIES LAW (REVISED)
AND IN THE MATTER OF THE BANKRUPTCY LAW (REVISED)

BETWEEN : THE ATTORNEY GENERAL OF THE CAYMAN ISLANDS APPLICANT

AND : CHRISTOPHER D. JOHNSON RESPONDENTS
KENNETH V. SHANAHAN

JUDGMENT

Mr. William Helfrecht for the Crown
Mr. Alan Turner for defendants

Schofield J.

On the 22nd July, 1993 George Theodore Bullmore, a Chartered Accountant, was appointed by the Governor to assume control of the affairs of Finsbury Bank and Trust Company (hereinafter called "the Company) pursuant to the provisions of section 14 (1) (d) (v) of the Bank and Trust Companies Law. In this judgment and in relation to the Laws referred to herein "the Governor" means the Governor in Council. As will be seen from the petition in this case the company was placed in voluntary liquidation at a meeting of its shareholders held on 11th February 1994.

Christopher Johnson and John Dinan were appointed Joint Liquidators of the Company. Pursuant to an order of this Court of the 14th February 1994 the liquidation was ordered to continue subject to the supervision of the Court. In cause 356 of 1993 the Governor applied for the compulsory winding-up of the Company. By an order made by consent of Governor and the Company, Christopher Johnson and Kenneth Shanahan were, on 20th August 1993, appointed joint official Receivers and Managers of the Company. This order was made after Mr. Bullmore had presented two reports to the Governor and after the Governor had revoked the licence of the Company issued under the Bank and Trust Companies Law on the advice of Mr. Bullmore. It was the intention of the Governor to apply for Mr. Bullmore to be liquidator of the Company but in the event he consented to the appointment of Messrs. Johnson and Shanahan as joint Official Receivers and Managers. I should add that there was also an application before the Court by the Company seeking damages against Mr. Bullmore and an injunction restraining him from carrying out further activities at the Company. I think that matter was compromised by the order of 20th August 1993.

Of course Mr. Bullmore incurred fees and disbursements and he put in a bill for \$124,448.39. The Governor had issued him with an indemnity for his fees and they were met in accordance with that indemnity. The Solicitor-General swore an affidavit of debt and served it on the Joint Liquidators of the Company. The proof of debt was rejected for the following reasons:

(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 the 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.

This application by the Solicitor-General is for an order that the decision to reject the proof of debt be reversed or varied.

The Company does not contest matters of quantum in relation to Mr. Bullmore's fees and disbursements. It simply and straightforwardly argues that it is not obliged to meet them. It is conceded by the Solicitor-General that Mr. Bullmore did not seek directions from the Court as to the powers to be exercised on his appointment; indeed the Governor, it seems, issued directions as to how he should carry out his appointment.

The first question I have to answer is whether Mr. Bullmore had power to do what he did in relation to the Company without seeking directions from this Court. That involves a construction of section

14 of the Bank and Trust Companies Law and section 18 of the Bankruptcy Law (revised). The relevant portion of section 14 of the Bank and Trust Companies Law reads:

"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 manager of a business appointed under section 18 of the Bankruptcy Law (Revised); and

(vi) (does not apply.) "

Section 18 of the Bankruptcy Law (Revised) reads:

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 part 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 a Trustee after an 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.

It is as well here to quote to the definition of mutatis mutandis in Black's Law Dictionary (5th ed.) to which I have been referred:

"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."

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 Bank 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 ie. 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. 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 Bank and Trust Companies Law to report back to the Governor on issues relevant to the revocation of the licence. The two duties sit comfortably together.

Learned Crown Counsel tried manfully to argue that the conduct of a receiver or manager appointed under section 14 is governed, not by the Court, but according to ordinary common law principles and he performs his duties in the same manner as an extra-curial receiver or manager. I cannot, with respect, accept that that is so from my understanding of the wording of the statutory provisions. Nor can I accept his argument that such an interpretation creates a toothless dragon. The dragon is created

by the Governor; the Court gives the dragon its teeth and is careful to give it the necessary teeth (but only such teeth as are necessary) to enable it to perform its function. Nor need the Court's involvement, cleared 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 other cases, once an appointment is made to prepare a speedy application for directions to be put before a judge in Chambers. It was not argued by learned Crown Counsel, and I think quite rightly so, that the words mutatis mutandis would stretch to permitting us to substitute references to the Governor for references to the Court in section 18 of the Bankruptcy Law. Someone has to exercise control over the receiver or manager and on my reading of the two sections under consideration it is the Court and not the Governor.

It follows that I am of the view that Mr. Bullmore acted in error in failing to seek the directions of the Court. The directions given should, under section 18 of the Bankruptcy Law, have come from the Court, and the Court alone, and any directions issued by the Governor in regard to the performance of Mr. Bullmore's functions were void and of no effect. The Governor's function is limited to matters relating to the licence of the Company. The Court exercises control over the performance of the functions of any appointee under section 14 of the Bank and Trust Companies Law as receiver or manager.

The third ground for the Joint Liquidators' refusal to pay Mr.

Bullmore's fees is that the Governor, in giving an indemnity and in honouring that indemnity, was an officious volunteer and has no right to be reimbursed. In this regard I derive great assistance from the judgment of Scarman L.J. in the English Court of Appeal decision of Owen v Tate [1967] Q.B. 402. At pp. 409-10 he had this to say:

"These cases, to my mind, amply support the proposition that a broad approach is needed to the question whether in circumstances such as these a right of indemnity arises, and that broad approach requires the court to look at all the circumstances of the case. It follows that the way in which the obligation came to be assumed is a relevant circumstance. If, for instance, the plaintiff has conferred a benefit upon the defendant behind his back in circumstances in which the beneficiary has no option but to accept the benefit, it is highly likely that the courts will say that there is no right of indemnity or reimbursement. But (to take the other extreme) if the plaintiff has made a payment in a situation not of his own choosing, but where the law imposes an obligation upon him to make the payment on behalf of the principal debtor, then clearly the right of indemnity does arise. Not every case will be so clear-cut: the fundamental question is whether in the circumstances it was reasonably necessary in the interests of the volunteer or the person for whom the payment was made, or both, that the payment should be made- whether in the circumstances it was "just and

reasonable" that a right of reimbursement should arise."

He went on, at pp 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 or 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 of reimbursement if in all the circumstances it is just and reasonable to do so.

If the Governor is to perform his duties and responsibilities under section 14 of the Bank and Trust Companies Law he must be given the tools with which to perform them. He must be given the facility to ensure that a receiver or manager will take on his duties. He must not be placed in a position where a potential appointee is unable to take up his duties because of financial constraints. As learned Crown Counsel has rightly pointed out: what if the available information was that the company had no assets and no person could therefore be found to take up an appointment? It is necessary for the Governor to have the power to give an indemnity in a case such as this. The statute must be made workable in practice and the Courts should not impose

unnecessary shackles on the Governor's exercise of his duties by picking over the question of the necessity of the issue of an indemnity in any given case. I consider that the circumstances of the statutory duties imposed on the Governor in this situation make him entitled to reimbursement in the usual case . It is interesting to note that in the last passage of Scarman L.J. in Owen v Tate he refers to an obligation being assumed "without an antecedent request." It cannot be gainsaid that, all other things being in order, Mr. Bullmore would have been entitled to his fees, his appointment being undoubtedly proper. The Company (being the licensee) would have been obliged to pay them. An antecedent request to the Company by the Governor was , and in the case of all such appointments under section 14 would be, impracticable and impossible. He appoints the receiver or manager and no doubt the appointee could ultimately look to the Governor for his fees in any event should he fail to receive them from the licensee. I cannot see how it can be said, given his statutory responsibilities that the Governor was an officious volunteer.

Should I order the Company to meet Mr. Bullmore's expenses in the circumstances of this case and particularly given that he erred in neglecting to seek the Court's directions? I should say at once that the Joint Liquidators do not dispute that at the end of the day the Governor gained sufficient material to justify the revocation of the Company's licence. The joint Liquidators are reaping some benefit from the work done by Mr. Bullmore. I have no material before me to suggest that he performed his functions

otherwise than properly and in good faith. I understand that complaint was made by the Company, or its shareholders, of Mr. Bullmore but the Company seemed basically to object to his very appointment which in the event appears to have been justified.

The Company's argument is that Mr. Bullmore was a trespasser and, as such he cannot be given his fees. Of course it would have been inconceivable that the Court, in the circumstances, would have denied Mr. Bullmore full powers to fulfill his appointment by the Governor had proper application been made. This is not a case where this appointment was found to be unnecessary or was based on an over-reaction to information received or was based on wrong information.

Section 14 of the Bank 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 of 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.

Dated this 24th day of October, 1995.

12

A handwritten signature in black ink, appearing to read 'D. Schofield', written in a cursive style.

D. Schofield

Judge

doc #372