

11 9 92
17 DJ
22/12
[Signature]



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

IN CHAMBERS

BEFORE THE HON THE CHIEF JUSTICE

ON THE 11TH OF SEPTEMBER 1992

CAUSE # 339 OF 1984

IN THE MATTER OF UNIVERSAL & SURETY COMPANY LTD.
(IN LIQUIDATION)
AND IN THE MATTER OF THE COMPANIES LAW

Mr. A. JONES FOR THE OFFICIAL LIQUIDATOR
Mr. P. LAMONTAGNE Q.C. FOR BEACON INSURANCE CO. LTD.

MALONE C. J.

RULING

The defendant - Beacon - having obtained leave to appeal my ruling of the 25th August 1992 on the condition that it undertakes to indemnify the liquidator his costs of the appeal, now applies for a stay pending the appeal.

The subject matter of the appeal is the offer of settlement made by B.D.O.S. to pay to the liquidator \$450,000.00 in return for the abandonment by him of his appeal to the Full Court of Appeal in Florida prior to the Full Court of Appeal delivering its ruling. That ruling is still pending.

The appeal, as Mr. Jones pointed out, may become academic by a ruling of the Full Court of Appeal in Florida. Nevertheless although the order granting leave to appeal may be amended as it has not been perfected it should not, I think, be amended or revoked for the issue appealed, as I said in my ruling of the 3 September 1992, is an important one. In such an instance, as the following passage at p127 of the judgment of Banks L.J. in the case of Buckle v Holmes (1926) 2 K.B. 125 illustrates, leave to appeal may be granted even where the law is not in question:

"We gave leave to appeal in this case, not because we thought there was any real doubt about the law, but because the question was one of general importance and one upon which further argument and a decision of this Court would be to the public advantage."

Further whilst it is likely that the Full Court of Appeal in Florida may rule before this appeal is heard it is not certain that it will rule.

In ruling on the question whether the liquidator should accept the offer of B.D.O.S. I made it clear then, I think, that the liquidator should give careful consideration to the wishes of the creditors but could not be expected to work without reward nor risk his own resources to finance the liquidation. Now it seems to me that Mr. Lamontagne recognises that if the defendant is to get a stay the liquidator must have protection. But Mr. Lamontagne offers protection only if the appeal is dismissed. The liquidator gets nothing, apart from being spared the costs of the appeal, if he loses the appeal. That is fair Mr. Lamontagne submits as to quote him:

" the liquidator is fully protected if he is
right "

To my mind Mr. Lamontagne's proposal puts at risk the advantages that accrue to the liquidation from the B.D.O.S. offer. Those advantages subsist whether the appeal is lost or won provided the offer is accepted before the Full Court of Appeal rules. Consequently if acceptance of the offer is stayed on the basis of Mr. Lamontagne's proposal the liquidator may get nothing if the Full Court of Appeal of Florida rules against him and he then loses the appeal here. That must be avoided as it seems to me unjust that the liquidator should be put in the position of risking the only money which it is plain may be recovered. Namely the \$450,000.00 offered by B.D.O.S. on condition that it is accepted before the Full Court of Appeal in Florida rules. There is no other money plainly recoverable as no one knows how the Court of Appeal in Florida will rule. Consequently except for the \$450,000.00 it cannot be said that without a stay there is no

reasonable possibility of the creditors getting back any money if their appeal here succeeds. What the creditors get if the appeal here succeeds and the Full Court of Appeal in Florida has not by then ruled is a chance in a gamble. Whether that chance will bring them benefit will of course depend upon the ruling of the Full Court of Appeal in Florida. In fact the chance of actual benefit is a slender one for ~~as~~. I pointed out in my judgement of the 25th August 1992:

"the opinion evidence suggests that the chances of failure to restore the judgment of the 7th December 1990 are greater than the chances of success."

To my mind therefore, this is not the kind of case of which it can be said that the appeal, if successful, will be nugatory, since to become nugatory demands something that existed and was recoverable. A chance to gamble that a jack - pot will exist is not such a thing. For that reason this is not a proper case for denying to the successful liquidator access to the \$450,000.00. If I could grant a stay it would be to stay acceptance of the B.D.O.S. offer pending the determination of the appeal if within a limited time \$450,000.00 was paid by the defendant into the liquidator's loan fund in cash and unconditionally in relation to the outcome of the appeal. Such an order would ensure that the liquidator got the \$450,000.00 but he would do so at the cost of the defendant and not of B.D.O.S. An arrangement which, although perhaps justifiable on the ground that if the defendant wants to gamble he must put up the stake, is not desirable as it penalizes the defendant. The better approach to this problem is to recognize, I think, that the defendant needs to be saved from himself. The application for a stay is refused.

September 11 1992

Denis J. Malone
Denis Malone