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

IN CHAMBERS

BEFORE THE HON THE CHIEF JUSTICE

ON 6TH, 7TH AND 10TH AUGUST 1992

CAUSE # 339 OF 1984

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

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

RULING

This is an application by the official liquidator of Universal Casualty and Surety Company Ltd. ("the company") now in compulsory liquidation. His application is for a direction by the Court that:

"he be authorised to accept or reject the offer of settlement received from Siedman and Siedman and Binder Dijker and Co. in respect of the litigation currently in the Third District Court of Appeal of Florida."

The application is opposed by Beacon Insurance Co. ("Beacon") a creditor of the company and a contributor to the official liquidator's loan fund. That fund was set up to meet the costs of legal proceedings for the recovery of losses sustained because of the negligence of the company's auditors.

Binder, Dijker, Otto and Co. and Siedman and Siedman (hereafter collectively referred to as "BDOS") were the former

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auditors of the company. Proceedings alleging negligence on their part were commenced against them by the official liquidator in the Florida Circuit Court for Dade County and on the 7th December 1990 judgment in the sum of U.S. \$15.7 million was entered against them. In effect the judgment represents the net loss caused by BDOS to the company and is a sum that is less but not greatly less than double the amount of the best of several offers subsequently made by BDOS to the official liquidator in consideration for BDOS terminating their appeal against the original judgment. Those offers were rejected. On the 14th April 1992 the rejection of the offers was put in question as on that day three Judges of the Florida Court of Appeal on the appeal by BDOS against the judgment of the Florida Circuit Court for Dade County set aside the judgment obtained from that court on the 7th December, 1990. The official liquidator appealed to the Full Court of Appeal to correct the decision of the three judges. The official liquidator's appeal is now pending before the Full Court of Appeal which is not expected to give a decision before the 31st of August 1992. Pending too, is a further offer by BDOS to the official liquidator. The offer is that in consideration of the payment by BDOS to the official liquidator of \$450,000.00 and the waiver by BDOS of the order for costs made in favour of BDOS by the three Judges of the Florida Court of Appeal the official liquidator will withdraw his application for a re-hearing by the Full Court of Appeal. That is

the offer of settlement on which a direction from this court is applied for by the official liquidator.

The first question that I must answer is, how am I to approach the issue whether to accept or reject the offer? Mr. Jones' submissions are that:

- (1) I am not to put myself in the position of the official liquidator and exercise his discretion for him.
- (2) I should act on the basis that the official liquidator is entitled to the sanction of the court unless he is doing something that is unlawful as by exceeding his powers, or acting fraudulently improperly or is proposing to act in a way that no reasonable liquidator would act.

In support of those submissions Mr. Jones cited the following passage at pp 280 - 281 from the judgement of Plowman J in *Leon v York-O-Matic Ltd. and Others* (1966) 3 A.E.R. 277:

"Here, as I have said, there is no question of fraud, and, having considered all the evidence
..... I am not satisfied that the liquidator did not exercise his discretion bona fide; nor am I satisfied that he acted in a way in which no reasonable liquidator could have acted."

Subsequently, Mr. Jones, it seems to me, backed off from his

initial position in respect of the entitlement of the official liquidator to the sanction of the Court unless he is not acting within his powers bona fide and reasonably. I think Mr. Jones was right to back off as I do not think the official liquidator has an entitlement as suggested by Mr. Jones. If that were the case, a finding of the court that the official liquidator had not acted in breach the criteria in the Leon case (ibid) might preclude the official liquidator from weighing as he should other considerations such as the wishes of the creditors. Mr. Lamontagne submitted that in a case of this kind, the court must look at the proposed settlement to see if it is reasonable for the official liquidator to give up an asset of the company. If the settlement is reasonable the court should sanction it. If it does not appear to be reasonable the court should not sanction it even though it could not be said that no reasonable liquidator would have entered into the compromise. I accept that the court must consider all of the evidence relevant to the proposed settlement. In particular, the evidence:

- (a) relevant to the question is the official liquidator's prospect of success in the Florida Appeal Court a reasonable one? and
- (b) from which a reasonable assessment may be made of the financial consequences of the decision to both the creditors and the official

liquidator; and

(c) as to the wishes of the creditors and the account of their views taken by the official liquidator.

On the basis of the findings made on the evidence examined, I agree with Mr. Jones that I am not to exercise the official liquidator's discretion for him but to consider the correctness or otherwise of his decision by the criteria cited from the judgment of Plowman J in Leon's case (ibid). Such consideration:

"to have regard to the general principles of fairness and commercial morality which underlie the details of the insolvency law as applied to companies."

(See *In re Palmer Marine Surveys Ltd.* (1986) 1 W.L.R. 573 per Hoffmann J at p 578).

In this matter, the official liquidator clearly took advice on the prospects of a successful appeal to the Full Court of Appeal. That advice was provided by Ms. Russo, Mr. Liggio and Mr. Jones. Ms. Russo and Mr. Liggio are American attorneys at law. Mr. Jones is an experienced English and Caymanian attorney-at-law but is not qualified to give opinions on American Law. As we all well know American principles of law frequently can be traced to English law and the fact that they

are written in English makes for apparent ease of understanding. But that very ease of understanding can itself give rise to misunderstanding due to words subtly changing their meanings when they cross the Atlantic and to differences of practice. I shall not embark on the exercise undertaken by Mr. Jones of analyzing and interpreting Ms. Russo's opinion in terms of seemingly corresponding English practices and principles. Nor do I think that I should, as Mr. Lamontagne invites me to do, analyse the two American cases of *Cenco Inc. v Seidman and Seidman* 686 Fed 2d 449 (1982) and *Schacht v Brown* 711F 2d 1343 (1983) and find that this is a *Schacht* and not a *Cenco* type of case. The merit of not following in Mr. Jones' or Mr. Lamontagne's footsteps is, I think, the greater when it is borne in mind that the principal issue in the litigation is whether the fraud of the former management of the company should be imputed to the company to defeat its recovering from BDOs the loss sustained by their negligence. For it is an issue that raises difficult questions both of law and of fact.

In general terms Ms. Russo's opinion is that the official liquidator should reject B.D.O.S' offer and seek to restore the judgment of the 7th December 1990. I do not agree with Mr. Jones that the opinion is not a firm one because she states that it is impossible to predict how the court will rule. Such a statement is invariably to be found in an opinion.

Therefore I do not think that the statement detracts from the firmness with which Ms. Russo expresses herself in the main body of the opinion. But, of course, firmness does not necessarily import soundness. In this instance a factor to be considered in weighing the value of the opinion is that counsel is retained on a contingency fee basis. Her remuneration, apart from out of pocket expenses, is dependent on her success. If she is denied the chance of achieving success she recovers her out of pocket expenses but receives no remuneration. It is a situation of conflict which detracts from the weight to be given to the opinion. Taking that factor into account and bearing in mind the difficult nature of an issue which Ms. Russo acknowledges may not be favourably resolved at a rehearing by the Full Court but may have to be taken, if leave is first obtained to the Florida Supreme Court, the chances of success, cannot, in my view be overwhelming.

Mr. Liggio did not write an opinion. He favored acceptance of the original offers made by BDOS. He expressed his views as follows:

"..... besides seeking to assist the liquidator at his request, I felt it imperative to provide an independent sounding board for the Liquidator by someone where interest was not driven or motivated by an increasing contingent fee which

is tied to the prospects of a possible, but unlikely, higher recovery. It was my judgment based on my knowledge of the law, as it existed prior to the appeal in this case, that the likelihood of success by the liquidator in sustaining the judgment was substantially less than 25%. This view was reinforced after I had read the briefs filed by each of the parties in the appellate court. As a result I expressed the view to the Liquidator that I felt it was a serious mistake to have rejected the several settlement offers of Seidman and Seidman."

The foregoing is not a written opinion but is much more than a "hunch". For although not reasoned, it is a strong statement of views by an attorney at law acquainted with the case and knowledgeable in the law. Mr. Liggio is not free of conflicting interest as he is an in-house attorney of the firm of Ernst & Young New York and the liquidator is a partner of Ernst and Young (Cayman). In Mr. Jones' opinion a factor that adds to the weight to be given to Mr. Liggio's views is his statement that:

"the likelihood of success by the Liquidator in sustaining the judgment was substantially less than 25%"

as he proved to be right in picking the winner. Of course, as

there are no specific reasons given by Mr. Liggio for his opinion it is not known whether Mr. Liggio's opinion correctly predicted the reasons given by the three Judges for their ruling or whether those reasons are not those of Mr. Liggio. Nevertheless it seems to me that Mr. Liggio's views are of sufficient weight to detract from the weight to be given to Ms. Russo's opinion. Nor is that finding affected by the fact that Ms. Russo's opinion has been adopted by Mr. Sherouse of the legal firm that has represented the company as he merely states his belief that Ms. Russo's comments and opinions are meritorious and that the proposed settlement is not adequate without indicating why he holds that belief.

The disparity between the settlement offer of \$450,000.00 and the judgment obtained of \$15.7 million, is so great that to give up that judgement in return for the offer would seem to me something that no reasonable liquidator would do in the absence of good cause. Assured failure of the appeal lodged by the official liquidator would provide good cause, but the evidence as to the chances of success or failure of the appeal to the Full Court of Appeal does not, as one would expect, show with certainty what would be the outcome in the Full Court of Appeal or the Florida Supreme Court. Nor in my view would a second opinion be of help as it can add to but cannot resolve the uncertainty. In any event it is now too late for a second

opinion.

On balance, the opinion evidence suggests that the chances of failure to restore the judgement of the 7 December 1990 are greater than the chances of success. Further, it would be reasonable to think that failure will be the more likely having regard to the fact that the judgment to be overturned is a unanimous judgment of three judges of the Court of Appeal. Of course, it is not unknown for the highest Court in the land to restore the judgment of a trial judge after intermediate courts of appeal have successively set it aside. Nevertheless it is unusual.

The official liquidator has no assets and the liquidator's loan fund is without funds. His firm's loss is approximately \$997,588.00, of which \$382,492 is the outstanding debt. It is for the most part made up of cash disbursements. If his appeal is successful the loss incurred will be recovered. If he does not win the appeal he loses both his out of pocket expenses and his fees. Acceptance of the offer would reduce his loss as his expenses are the first charge in the order of priority.

The creditor's position is not the same as the official liquidators save if the offer is refused and the appeal

is successful, for if the B.D.O.S. offer is refused and the appeal is lost the creditors stand to lose virtually no more than they have already lost and if the offer is accepted they stand to gain nothing. I agree with the official liquidator that he is under no obligation to work without remuneration let alone use his own resources to finance the liquidation. Yet it is precisely that which he is being asked to do as at best the respondent offers to fund the liquidator's costs of appeal estimated by Ms. Russo at between U.S. \$1,000.00 and U.S. \$3,000.00. It is an offer that gives to the creditors the opportunity of winning the jack pot at the minimum cost to themselves since they have nothing to gain or lose by accepting the offer or by rejecting it and losing the appeal, though, of course they have everything to gain should the appeal be successful. On the basis of that analysis of the relative positions of the official liquidator and the creditors and having regard to the appeal's limited chance of success I am of the opinion that a liquidator who accepted the offer would be acting reasonably. I am of the opinion also that despite the conflict of interest that the official liquidator in this case has, he will be acting bona fide and within his powers if he accepted the B.D.O.S. offer. By contrast the bona fide of the creditors are put in question. Their views I reject in this instance after careful consideration.

For the forgoing reasons I authorize the official liquidator to accept the offer of settlement received from B.D.O.S. in respect of the litigation currently pending in the third District Court of Appeal Florida.

23rd August 92

Don J. Miller