ACTION NO: W3/2011

IN THE SUPREME COURT
TURKS AND CAICOS ISLANDS

IN THE MATTER OF JOHNSTON INTERNATIONAL LIMITED (IN LIQUIDATION) ("JIL")
AND IN THE MATTER OF AN APPLICATION BY BRITISH CARIBBEAN BANK LTD ("THE APPLICANT") IN THE LIQUIDATION FOR DELIVERY UP AND PAYMENT OVER OF THE ASSETS OF THE APPLICANT AND FOR THE PAYMENT OF COURT ORDERED COSTS AND UNDER ORDER 63, RULE 4 OF THE CIVIL RULES 2000

BEFORE the Chief Justice, the Hon Ms. Justice Ramsay-Hale
Mr. Conrad Griffiths QC for the Applicant
Mr. Martin Green for the Joint Official Liquidators
Heard on 25 July, 20 October, 16 November and 21 December 2017

SUPREME COURT ★ TURKS AND CAICOS ISLANDS ★

JUDGMENT ON APPLICATION FOR COSTS

Introductory

1. British Caribbean Bank Ltd ("the Bank") is a secured creditor of Johnston International Limited (In Liquidation) ("JIL") which went into compulsory liquidation in 2011.

2. In 2012, the Bank was sued upon two retention bonds provided by JIL in favour of Interhealth under the terms of a construction contract made between them for which bonds the Bank was surety. Interhealth was successful and the Bank was ordered to pay out the sum of $1.11m[1] to Interhealth with interest as well as the costs Interhealth had incurred in pursuing the claim against the Bank and opposing the Bank's appeal.[2]

3. The Bank asserted, as against JIL, that it was agreed whether expressly or implied as a matter of law, that the monies paid by the Bank under the retention bonds would be repaid by JIL and further, that as it was a secured creditor, all monies held by JIL after final judgment was entered against the Bank were held on trust for it.

4. The Bank in correspondence asked the Joint Official Liquidators ("JOLs") to make the payment now due to it. Having received no affirmative response to its request, the Bank instituted proceedings by way of Writ issued 18 July 2016, to recover the sums paid out to Interhealth.[3] Following the Bank's application for summary judgment, JIL was ordered to pay the amount paid by the Bank on the Bonds.

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[1] Action No. CI 138/2012
[2] Civil Appeal No. 35/2012
[3] CL 105/2016

5. No monies were paid over and the Bank subsequently applied to the Court, by summons filed on 7 July 2017, for an Order that the monies remaining in the hands of the JOLs be paid over to the Bank in settlement of the judgment debt and the associated costs.

6. The Bank also sought an order for an account against the JOLs as well as an order that it be permitted to inspect all documents on the Court file relevant to the recovery of assets in the liquidation.

7. The summons came on for hearing on 25 July 2017. Mr. Green sought an adjournment on behalf of the JOLs to allow them time to make an application for a *Berkeley Applegate* order. Mr. Griffiths QC objected to the adjournment, observing that he had raised the issue of a *Berkeley Applegate* order with Mr. Green in 2014 when he had made it clear that the Bank was asserting that the funds in the hands of the JOLs formed part of the Bank's secured fund and were not part of the liquidation estate, and that the need for the JOLs to make an application for such an order was obvious. Mr. Green in response, however, contended that the necessity to apply for a *Berkeley Applegate* order was not clear before the Bank obtained summary judgment and further that London Counsel had been instructed in the matter of the *Berkeley Applegate* application and his unavailability necessitated the adjournment. Mr. Green submitted further that the JOLs believed they had identified a substantial claim and needed to apply to the Court for approval to pursue it, which also necessitated an adjournment. The adjournment was granted and costs were reserved.

8. On 20 October 2017, the Bank's summons came on again for hearing. No application had been filed by the JOLs in the intervening period for a *Berkeley Applegate* order. Mr. Green explained that the JOLs had had difficulty making the application because of the commitments of overseas Counsel and the passage of Hurricane Irma. The matter was adjourned again on the JOLs' application and costs were awarded to the Bank on that occasion.

9. On 7 November, the JOLs filed an application asking the Court to approve *"the application of funds held by the company [JIL], on trust for British Caribbean Bank Ltd ("the Bank") to the purposes set out [in] the affidavit of Andrew James Newlands."*

10. In his affidavit, Mr. Newlands seeks permission to use the funds in the JOLs' hands to pursue various claims against JIL's former auditors and an officer of the Company [4]. The JOLs application was dismissed on 16 November, for the reason that it did not fall within the *Berkeley Applegate* principle, the evidence of the JOLs that the putative claims might result in a substantial dividend was not persuasive and there was no principled basis on which the JOLs could be permitted by the Court to utilise a fund which did not form part of the assets of the Company to pursue the claims over the objection of the secured creditor to whom the fund belonged: see *Buchler v Talbot (Leyland Daf)* [2004] UKHL 9.

11. Despite adverting to the monies in the hands of the JOL's as held on trust, Mr. Green suggested in the course of the hearing that the JOLs resisted the Bank's application because the monies had already been 'spoken for' as the JOLs had incurred expenses *prior* to becoming aware of the debt owed to the Bank on its indemnity which funds did not form part of the trust estate.

[4] See para 45 of Affidavit of Andrew Newlands

12. The suggestion was plainly at odds with the assertion in the Notice that the funds were held on trust yet Mr. Green sought a further adjournment to permit the JOLs to bring an application for remuneration in respect of their unpaid time and unpaid expenses which included an estimated $83,835 for legal fees[5].

13. In later correspondence, which was exhibited by Mr. Griffiths, the JOLs indicated they did not intend to pursue any further application for approval of their fees.

14. On the 21 December 2017, the Court granted the Bank's application and ordered that the sums in the hands of the JOLs be paid over, there being no further challenge to the Banks' proprietary interest in the sums in issue. The Court also granted the Bank's application, as a party to the proceedings and a creditor, for access to the Court's file and for an account.

15. Having succeeded in its application and successfully defending the JOLs' application, the Bank is undoubtedly entitled to its costs, including the wasted costs of the 16 November adjournment. The question which remains for resolution in the applications is whether the costs of the summons be paid by the JOLSs personally.

The Submissions

16. Mr. Griffiths submitted that the JOLs ought to have paid over the sums in their possession as these monies were held in trust for it as a secured creditor and that in the circumstances where the Bank prevailed, it should have its costs as well as its costs of the JOLs' unsuccessful 7 November application and the costs wasted by the 16 November adjournment.

17. Learned Queen's Counsel submitted, further, that as none of the costs the Court is being asked to sanction involved the JOLs getting in the company's assets for the benefit of the estate but rather, were costs incurred essentially by a Trustee opposing the beneficiary's application for its funds, the Court should, in the exercise of its supervisory jurisdiction as the liquidation court, fix the JOLs with personal liability for the costs.

18. He contends that as the monies held by the JOLs were held on bare trust for Bank, they should have been paid over no later than March 2017 when summary judgment was entered against the Company and that they were not paid over amounted to a breach of trust which was a sufficient reason to order the JOLs to pay costs personally.

19. Mr. Griffiths also submits that it was wrong and improper for the JOLs to deny the Bank any access to any documents in the liquidation other than the page-and-a-half summary that was produced by order of the court, and that a personal costs order is also justified as they have forced the Bank to come to court to obtain disclosure.

20. Learned Queen's Counsel also contends that the JOLs should personally pay the costs of the 7 November application as well as the 16 November adjournment, sought to allow the JOLs time to apply for fees, as the adjournment was for their own benefit and not for the purposes of the liquidation.

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[5] See para 43 *ibid*

21. In response, Mr. Green submitted that the fact that the JOLs took a hostile stance cannot be described as impropriety and that, absent impropriety, there is no principled basis on which to fix the JOLs with personal liability for costs.

Principles governing costs in Insolvency matters

22. There is a distinction between the role of the Court exercising its adjudicatory jurisdiction in litigation and awarding costs to the successful party and the Court exercising its supervisory role in the administration of a liquidation deciding whether those costs should be allowed from the assets of the company.

23. When the Liquidator appears as ***a respondent,*** costs are ordinarily ordered to be paid directly out of the assets of the company. A liquidator who ***responds*** to proceedings whether to approve a claim or, as here, for the payment out of monies in the JOL's hands, has no choice whether to take part and, if he acts to protect the fund, then any costs he is ordered to pay as a consequence of losing in such proceedings would be a charge on the fund.

24. He is directly protected against litigation by Rule 7.39 of the Insolvency Rules UK which rules guide the Courts here in the exercise of their jurisdiction to wind up companies. The Rule provides that

"...Where the official receiver or a responsible insolvency practitioner is made a party to any proceedings on the application of another party to the proceedings, he shall not be personally liable for costs unless the court otherwise directs."

25. In *Re Mordant* [1995] 2 BCLC 647 dealing with the trustee in bankruptcy to whom the rule is equally applicable, Nicholls VC said,

"I don't not think these factors lead to the conclusion that it would be right to depart from what r. 7.39 indicated is to be the starting point regarding costs orders against respondent trustees in bankruptcy, namely there is no personal liability unless, in effect, ***there is good reason to direct otherwise."***

26. Where a Liquidator ***initiates*** proceedings, then if those proceedings are unsuccessful an order for costs will generally be made against the liquidator personally, though he will have a right of indemnity against the fund and can make application to the Court with administrative responsibility for the liquidation for recoupment.

27. In considering the distinction, Oliver J in *Re Wilson Lovatt & Sons Limited* [1977] 1 All ER 274 at 285, said:

"I think that a review of the authorities does disclose that a clear dichotomy between the case where the liquidator is sued and the case where the liquidator initiates proceedings, is established, and indeed it seems to me to be a perfectly reasonable one*. I cannot at the moment see why it should be contended that a liquidator who takes it on himself to institute proceedings, to bring parties before the court, to subject them to costs, and as against whom it is quite clearly established that no order for security can be made, should then be entitled to plead that he is not*

responsible beyond the extent of the assets in his hands. I can see no reason at all why a liquidator should be entitled to an immunity which is not conferred on other litigants. A ***trustee or a personal representative who institutes proceedings no doubt has a right to indemnity out of the estate which he represents but, if he litigates, he litigates at his own risk and so, in my judgment, it should be with the liquidator,*** *and the authorities which point that way seem to me, if I may say so respectfully, to be completely reasonable.*

I can quite see that there may be very powerful reasons of policy for a rule that a liquidator, when carrying out his functions and thus subjecting himself to the possibility of proceedings against him by parties who are discontented with the way in which he has carried out those functions, must be entitled to defend himself without being subjected to the risk of having costs awarded against him personally, because of course he cannot protect himself against claims being made. Unless there were some such rule it might be very difficult to get persons to take on the heavy responsibility of the liquidation of companies. It seems to me that it is quite a different matter where the liquidator himself takes it on himself to institute proceedings, whether they be proceedings in the winding-up or otherwise."

28. The Court in *Metalloy Supplies Ltd. v MA (UK) Ltd* [1997] 1 All ER 418, to which both Counsel referred in the course of their submissions, held that a Court can only order the liquidator to pay costs where there has been impropriety in his conduct of the action.

29. Mr. Griffiths invited me to rely on Singapore decision of *Ho Wing On v ECRC* [2006] SGCA 25, in which the Chief Justice observed that *Metalloy* was only concerned with the adjudicatory jurisdiction of the court hearing the litigation to order costs against a non-party and it was not authority for the scope of the court's supervisory jurisdiction to order a liquidator to personally pay the defendant's costs.

30. The Chief Justice stated that the Court's supervisory jurisdiction over liquidators is significantly broader and extends beyond the purview of the liquidators' conduct of litigation [6] and that a liquidator may be personally liable to costs when he has *"done something to make himself personally liable for the cost"* , citing Linley LJ in *Re Bolton and Co* [1895] 1 Ch 333 at 334.

31. The Court examined divers authorities which showed that a liquidator may be held liable in costs for breaches of the estates costs rule: see *Re Pacific Coast* and for breaches of other kinds of priority rules as where the liquidator was held personally liable for his failure to ensure the retention of money to pay group tax in *Deputy Comr of Taxation v Tideturn (2201) 37 ACSR 152 and in Re Canadian Plumbago Co (1884) 27 Ch D* for breaches of common law priority rules.

Discussion

32. Although the learned Chief Justice made reference to a number of statutory provisions in the Singapore Companies Act, it is not right to say, as Mr. Green has done, that the decision is not authority for the proposition that a liquidator cannot be made personally liable for costs unless he has acted improperly in the conduct of litigation.

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[6] Paragraph 46

33. Mr. Green's reliance on *Metalloy* is inapt for the reason that the proceedings in issue are not brought *by* the Company and the JOLs are not non-parties as stated by the Court in *Ho Wing On*. Here the application was made by the secured creditor to the Court supervising the liquidation for the payment out to it of its funds which were held in trust for it by the JOLs. The JOLs were a party to the application. The law is clear that the fund belonging to a secured creditor does not form part of the liquidation estate. The JOLs were obliged to pay the monies out and refused, and their refusal prompted the Bank's application which they then opposed without any legal basis for so doing. The JOLs cannot be said to have been acting to protect the liquidation estate as the fund was the property of the secured creditor and fell outside the liquidation estate.

34. In my view the Court may properly exercise its supervisory jurisdiction and order liquidators to pay costs personally where they have breached their fiduciary duty to distribute the assets of a company or, as here, they have failed to pay out to a secured creditor funds held in trust. If the liquidator defends proceedings brought by the secured creditor for whom he holds property in trust and opposes his claim, he makes himself personally liable for costs.

35. The JOL's opposition to the Bank's demand was unreasonable and they cannot now say that they ought not to be personally liable to pay the costs the Bank was obliged to incur because of their intransigence. I order that the JOL's pay the costs of the Bank's summons personally, such costs summarily assessed if not agreed.

36. With respect to the 16 November adjournment sought so the JOLs could make application for their fees and costs, the JOLs were in making the application plainly preferring their own interests to that of the beneficiary which also leads me to hold that they should pay the costs wasted by that adjournment personally, such costs to be summarily assessed if not agreed.

37. With respect to Mr. Griffiths' application that the JOLs pay the costs of their application for directions, it is an incident of a winding up that the liquidator apply to the Court for directions and they should not, in my view, be penalised in costs for so doing.

DATED THE 21 JUNE 2019

CHIEF JUSTICE

SUPREME COURT
TURKS AND CAICOS ISLANDS