

21-03-11

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

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CAUSE NO. FSD 0063 of 2009
(Originally Cause No. 830 of 2003)

8 IN THE MATTER OF the Companies Law (2010 Revision)

9 AND IN THE MATTER OF Parmalat Capital Finance Limited

10 (In Official Liquidation)

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12 Appearances: Ms. Sandie Corbett of Walkers
13 for the Joint Official Liquidators

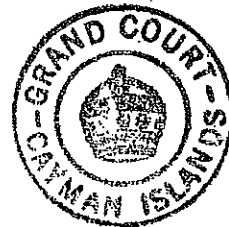
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15 Before: Hon. Justice Henderson

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17 Heard: March 3rd, 2011

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JUDGMENT

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21 1. When Antonio Vierci and Ana Maria Yakisich ("the creditors")
22 submitted a proof of debt in the liquidation of Parmalat Capital
23 Finance Limited the Joint Official Liquidators ("the JOLs")
24 determined that the evidence of identity was unsatisfactory. They
25 sent several email messages to the creditors which went unanswered.

1 Apparently, they were intercepted by a junk email filter and
2 quarantined. When the JOLs received no response to their request
3 for better evidence of identity, the proof was rejected.

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5 2. Eventually, satisfactory evidence of identity was presented and the
6 JOLs were asked to reverse their decision. Acting upon legal advice,
7 the JOLs have taken the position that Order 16 of the Winding Up
8 Rules, 2008 does not allow the JOLs to reverse the rejection of a
9 proof of debt. They advised the creditors that their only recourse
10 was an appeal to this Court. When the appeal came on for hearing
11 before me the JOLs agreed that it should be allowed. Accordingly,
12 the appeal is allowed, the rejection of the proof of debt is set aside,
13 and the revised proof of debt is admitted for dividend. Since the
14 creditors failed to maintain proper monitoring of their own email
15 service, they are largely the authors of their own misfortune and are
16 not entitled to their costs.

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18 3. In the hope of assisting liquidators who may in the future perceive a
19 similar difficulty, I provide these comments on the terms of Order
20 16.

21

1 4. When an official liquidator is adjudicating upon the claim of a
2 creditor, he is acting in a quasi-judicial capacity: Order 16, rule 1
3 (4), Winding Up Rules, 2008 (“the Rules”).
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5 5. A creditor has the right “at any time” to withdraw or vary his proof
6 of debt by agreement with the liquidator. The applicable provision is
7 Order 16, rule 5 (1) which reads:

8 “A creditor’s proof may at any time, by agreement between
9 himself and the liquidator, be withdrawn or varied as to the
10 amount claimed.”
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13 6. The right to an appeal by a dissatisfied creditor is provided for
14 expressly in Order 16, rule 17 (1) which reads:

15 “if a creditor is dissatisfied with the official liquidator’s
16 decision with respect to his proof (including any decision
17 on the question of priority), he may appeal to the Court
18 for the decision to be reversed or varied.”
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20 The word “Court” here means the Grand Court of the Cayman
21 Islands. Order 16, rule 6 (3) requires an official liquidator who is
22 rejecting a proof of debt to advise the creditor of his right to appeal.
23 Order 16, rule 18 (5) confirms that the appeal shall be dealt with as a
24 *de novo* adjudication of the creditor’s proof of debt and additional
25 evidence may be considered. There are also provisions (in Order 16,

1 rule 20 and 21) giving the Court jurisdiction to expunge a proof of
2 debt which has been admitted. Nothing in the Rules refers to a
3 possible reconsideration by a liquidator of his previous rejection of a
4 proof of debt. The question I have been asked to consider is whether
5 such a reconsideration is permitted.

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7 7. It is not uncommon for decision makers, including judges, to
8 reconsider a decision upon the basis of fresh evidence or argument
9 and vary the terms of a decision previously made. The fact that the
10 JOLs act in a quasi-judicial capacity when adjudicating upon a proof
11 of debt does not by itself suggest that any reconsideration of the
12 decision later on is not permitted. In the absence of language in the
13 Rules which makes such a reconsideration impermissible, JOLs must
14 be taken to have the same flexibility to reconsider decisions, take
15 into account new evidence and fresh arguments, and rectify mistakes
16 as is possessed by any other judicial, quasi-judicial or administrative
17 decision-maker. An appeal to the Grand Court is a relatively
18 expensive requirement for the rectification of a simple breakdown in
19 communication of the sort which occurred here. I would not hold
20 that an official liquidator is prohibited from reconsidering a decision

1 unless compelled to do so by express language in the Rules. The
2 Rules contain no such language.

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4 8. The Rules tend to support the view that a reconsideration of the
5 decision is possible. Rule 5 (1) provides that a creditor's proof of
6 debt may be withdrawn or varied by agreement with the liquidator
7 "at any time". I see no reason why that proof of debt may not be
8 withdrawn (with the liquidator's agreement) after it has been
9 adjudicated upon and rejected. Once withdrawn, the creditor is then
10 free to submit a fresh proof of debt containing new evidence or
11 argument which the liquidator may then rule upon. In effect, a
12 liquidator has the power to reconsider an adjudication if he considers
13 that is the fair and reasonable thing to do.

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15 9. When determining whether it is fair and reasonable to reconsider an
16 adjudication, a liquidator must have regard to the rights of third
17 parties. If any third party may be prejudiced by the reconsideration
18 in the sense that he has relied to his detriment on the fact of the
19 rejection, the liquidator should give notice of the prospective
20 reconsideration to that party. If the third party objects to the
21 reconsideration and demonstrates that he is likely to be prejudiced by

1 a reversal of the decision, the liquidator should not reconsider his
2 decision but should leave the creditor to pursue his right of appeal
3 accorded to him by the Rules. Subject to this consideration of the
4 position of affected third parties, a liquidator is free to reconsider a
5 decision to reject a proof of debt.

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7 Dated this 21st day of March, 2011

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Henderson, J.

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Henderson, J.
Judge of the Grand Court

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