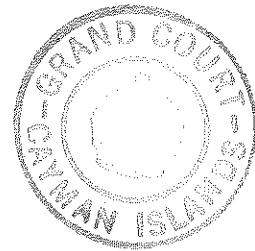


**IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION**

CAUSE NO: FSD 22 OF 2015 (ASCJ)

**IN THE MATTER OF SECTION 124 OF THE COMPANIES LAW (AS AMENDED)
AND
IN THE MATTER OF CALEDONIAN BANK LIMITED (IN VOLUNTARY
LIQUIDATION) (“The Bank”)**

IN OPEN COURT
BEFORE THE HON. ANTHONY SMELLIE, CHIEF JUSTICE
THE 11TH AND 12TH FEBRUARY 2015



APPEARANCES: Mr. Colin McKie Q.C, Mr. Luke Stockdale and Mr. Matthew Crawford of
Maples and Calder for the Joint Voluntary Liquidators

Mr. Andre Mondesir, Deputy Senior Counsel for the Cayman Islands
Monetary Authority (“CIMA”) (with him Mrs. Cindy Scotland, Managing
Director of CIMA).

Mrs. Colette Wilkins and Mr. Rupert Bell of Walkers for the Controllers.

Mr. Sam Dawson of Solomon Harris for a number of depositors of the
Bank

*Banking company placed into voluntary liquidation after regulator appointed controllers over its
affairs, whether appointment of controllers takes precedence over appointment of voluntary
liquidators.*

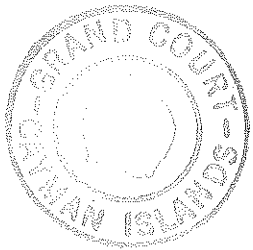
RULING

1. All parties represented here are agreed that the Bank should be wound up. The issue is
the identity of the liquidators: should they be the Joint Voluntary Liquidators appointed
by the shareholder (“JVLs”) or the Controllers appointed by CIMA in its capacity as the

regulator of its licensee, the Bank. Thus defined, the issue becomes who has the *locus standi* to apply to the Court for its recognition and sanction by conferment of powers to conduct the affairs of the Bank.

2. The inevitability of the winding up of the Bank is indicated by a number of factors:

- (i) Allegations of fraudulent trading in securities, raised against the Bank, its affiliate Caledonian Securities Limited and other defendants, by the Securities Exchange Commission of the United States of America (“SEC”) and as a result of which a Temporary Restraining Order (“TRO”) has been issued by the United States District Court for the Southern District of New York. The TRO initially restrained all the Bank’s assets within the U.S.A but was subsequently reduced to require that about USD76 million of the Bank’s assets shall remain within in the U.S.A and so within its reach.
- (ii) The appointment on the 10th February 2015 of the Controllers by CIMA, to take control of the Bank’s affairs. I am told by Mr Mondesir that this appointment was made by CIMA in its role as regulator out of concern about the regulatory implications of the SEC allegations and actions, as well as out of CIMA’s separate concern for the interests of depositors. The latter having regard, among other things, to evidence of attempts by officers of the Bank to transfer funds away to a related entity, notwithstanding the circumstances of the doubtful solvency of the Bank. There are also of course, general reputational concerns for the banking industry as a whole in the event of the failure of one of its Class A licensees (as is the Bank) - the kind of concerns that CIMA must have as the regulator of the industry.



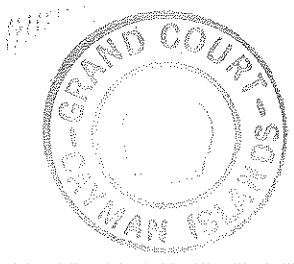
(iii) The resolution of the sole shareholder of the Bank on the 10th February 2015, putting the Bank into voluntary liquidation and appointing the JVLs but taken only after the appointment of the Controllers by CIMA and after notification of that appointment to the Directors of the Bank.

(iv) The refusal of the Directors to issue a declaration of solvency in the light of the apparent insolvency of the Bank. The Consolidated Financial Statements of the Bank show total assets at USD618m and total liabilities at USD593m, with shareholder's equity at USD25m. This state of affairs when considered with regard to the SEC TRO which by itself, if ultimately enforced would exceed shareholder's equity by some USD51m, points to the probability that the Bank will prove to be insolvent.

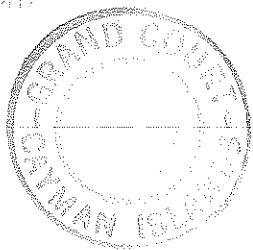
(v) A virtual "run" on the Bank, with requests for withdrawals already reaching more than USD68 million; the SEC investigations and the TRO having become public knowledge.

3. It is in these circumstances that I am presented with their petition by the JVLs for the voluntary liquidation to continue under the supervision of the Court and the opposition of CIMA who seek instead, that the Controllers' appointment be recognized and, if not immediately clothed with the powers to be vested by the Court pursuant to Section 18 of the Bankruptcy Law, that the Controllers are appointed as official liquidators instead of the JVLs.

4. A number of depositors – those represented by Mr Dawson - support the appointment of liquidators by the Court but are impartial as to whether the Controllers or the JVLs should be appointed.



5. Given the serious and far-reaching implications of the present circumstances, the question of the identity of the court-appointed officials is one that requires a principled answer.
6. Although they are certainly well qualified and reputable and no-one suggests otherwise, I may not appoint the JVLs simply because they also happen to be first in time before the Court with a petition. Nor may I appoint the Controllers – who are no doubt equally suitable for appointment - simply because of the apparent seriousness with which CIMA as the regulator appointing them, regards the matter.
7. To the extent that the law provides a solution to the question presented, that is the solution I must seek to apply. As is often the case in the absence of clear and settled precedent, one is inclined to look to first principles for the answer. The obvious question must be asked: what was the immediate meaning and effect of the appointment of the Controllers - being the action of CIMA as the regulator - taken and notified to the Directors and Shareholder of the Bank, before the resolution to appoint the JVLs was taken?
8. Section 18 of the Banks and Trust Companies Law allows CIMA, when it is of the opinion that at least one of a number of circumstances identified by that section is present, to, among other things, “forthwith ... 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 (1997 Revision)” (emphasis added).
9. This Court has time and again recognized the awkwardness of this provision as it requires the assimilation and reconciliation of two different legislative regimes, recommending that it be modernized to reflect the true meaning of the dual but separate roles of CIMA



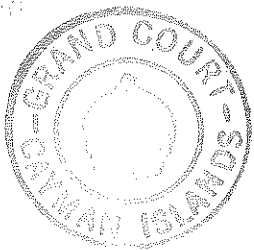
and the Court in the making of these appointments.¹ I repeat that recommendation now. But be that as it may, I am once again called upon - this time perhaps more pointedly than ever before because of the competing claims to *locus standi* – to identify and express the true meaning and effect of these provisions of the Laws.

10. The JVLs claim to primacy of position implies a challenge to the position of the Controllars. Their claim raises the question whether the Controllars are vested with and can exercise the statutory powers by way of actually taking over the conduct of the affairs of a licensee simply by virtue of, and immediately upon, their appointment by CIMA or whether they must first obtain the imprimatur of the Court pursuant to section 18 of the Bankruptcy Law, before being able so to act.

11. The Court of Appeal grappled with this issue albeit in a different context in *Finsbury Banks and Trust v Attorney General* 1996 CILR 349 and declared as follows in terms which I think provide a strong indication of what the answer to the present question must be (p. 359 lines 40-45):

“Applying the liberal approach of reconciliation to s.18 of the Bankruptcy Law, the receiver and manager appointed thereunder by the court is a creature of the court and his powers as such are conferred by the courts but this cannot be used to derogate from the express power of the Governor’s appointee to assume control of the licensee’s affairs.”

12. While the Court of Appeal did not there go on to explain just what are the appurtenances of the assumption of control by that controller of Finsbury Bank’ affairs upon his



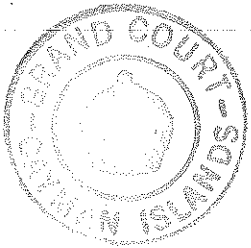
¹ See, for instance the Governor-in-Council, Roy McTaggart, Frederico Golcher v Federated Int’l Bank, GC Cause 697/98, unreported, 5th November 1998. At that time as at the earlier time of the appointment in *Finsbury Bank* (below), the Governor-in-Council exercised the powers now vested in CIMA by the Banks and Trust Companies Law.

appointment by the Governor; it is clear from the Court's determination of the issue then before it - whether to allow that appointee to recover his fees and costs from the assets of the Finsbury Bank after his appointment had been determined - that the Court regarded his actions taken, on the basis of his appointment by the Governor, to have been validly taken.

13. Mr. McKie Q.C. now argues to the contrary. He submits that the appointment by CIMA here vests the Controllers only with standing to apply to this Court for their powers under the Bankruptcy Law to be confirmed – thus that their powers are conditional powers, conferred only conditionally by CIMA, unless and until they are confirmed by the Court.

14. This is not a construction which, in my view, could do justice to the regulatory objectives of the legislative scheme or to CIMA's role as regulator. Given the volatility and urgency of the myriad circumstances which could arise, including the urgent need to preserve assets and protect the integrity of records, the word "forthwith" as it appears in the statute as emphasized above, must be construed as carrying a literal and mandatory meaning.

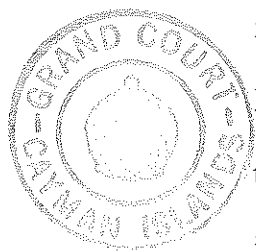
15. In my view, at the very least, the legislative scheme must mean that the appointment of the Controllers by CIMA, forthwith upon CIMA being of the opinion that at least one of the qualifying circumstances exists, vests immediate control of the licensee's affairs in the Controllers. What, at the very least, this must mean is that the Controllers, if not as against the world at large, are certainly, as against the licensee itself, in a position immediately to demand that it cedes operation of its business to them, including that those hitherto in control must hand over its books and records and relinquish control of such of the licensee's assets as may be within their immediate control.



16. While, as against others, the Controllers may find (for instance for the purpose of recovering assets which may be at large) that their appointment is not effective without the aid of the Court (vesting them with the assimilated powers to be bestowed pursuant to section 18 of the Bankruptcy Law²), it surely cannot be right that as against the licensee on notice of their appointment, the Controllers can simply be ignored. The licensee and those hitherto in control of it, are bound to comply with the appointment of the Controllers and this must mean immediately relinquishing control of the licensee's affairs. The position therefore is that the Controllers have effectively assumed control of the licensee's affairs to the exclusion of the JVLs, the Directors and the Shareholder, and anyone else who may claim any aspect of control.

17. That being my interpretation of the legislation, it must follow that, although the Shareholder here was not shorn of its right to resolve to place the licensee into voluntary liquidation, it did not keep a residual power to vest control of the affairs of the licensee in its appointed JVLs, once the appointment of the Controllers had been effected by CIMA.

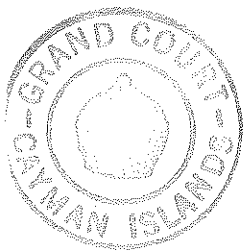
Its resolution taken on 10th February 2015 purportedly to do so, after and with notice of the appointment of the Controllers by CIMA, was a mere *brutum fulmen*, having no effect in law over the affairs of the licensee; other than such notional effect as might be allowed notwithstanding the appointment of the Controllers. By this I mean for instance, the putting in train of the voluntary liquidation process and the notional effectuation of the



² Section 18 reads: "At any time after a petition has been filed the Court may order that the Trustee become a receiver or manager of the property or business of the debtor or any part thereof and the Trustee shall thereupon 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 may 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 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"

appointment of the JVLs itself, that which I am told has since been registered with the Registrar of Companies and so regarded by the Companies Law as effective for giving notice of the appointment to the world at large. The practical effect – bearing mind that the Bank is also a corporate entity - was no more than to vest the JVLs with only such residual powers as might otherwise remain in the Directors themselves notwithstanding the appointment of the Controllers, as well as such fiduciary powers and duties that liquidators might have and owe to depositors and shareholders, in the context of a liquidation of a company that is a licensee and which they could still be allowed to perform by means of agreement and co-operation with the Controllers. These may include, for instance, the receipt and acknowledgement of proofs of debts (e.g: depositors' claims), pending their adjudication in the course of the eventual winding-up of the licensee. The voluntary liquidation is in train but the licensee and its affairs are under the control of the Controllers.

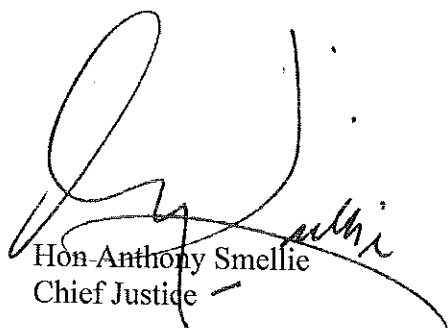
18. That being my view of the legal position, as fully as I think I can safely express it in this context; the consequence in principle, must be that the JVLs' petition to this Court, seeking that their appointment should continue under the supervision of the Court and as vested with those powers which this Court could grant only to office-holders who already have effective control of the affairs of the licensee, must be refused.
19. It is so ordered.
20. While I do not have before me a formal application for the vesting in of the Controllers of the section 18 Bankruptcy Law powers, this is not an occasion when form should take precedence over substance. Such an application has been made in the course of his arguments by Mr. Mondesir speaking for CIMA, supported by Mrs Wilkins on behalf of

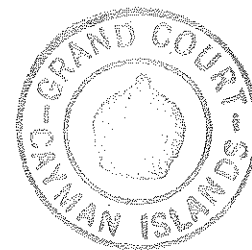


the Controllers. I therefore make an order to that effect which, in turn, also allows me to direct that the Controllers must submit their first report to CIMA and to the Court, within a time to be now set by agreement with CIMA. Upon receipt of that report, the Controllers, if so directed by CIMA, are to be at liberty to petition - upon giving the requisite notices of the petition to all who may be interested - for their further appointment as joint official liquidators of the Bank.

21. That being the nature of the order that I make, it would be perfectly understandable that the JVLs should wish to be relieved of their appointment, purely formal in nature that it is now declared to be. That is what I gather from Mr. McKie Q.C. would be their intention and so, if they do relinquish their purely formal appointments, I am prepared to acknowledge that any actions taken by them so far, acting in good faith as JVLs, should eventually be ratified by the Controllers and/or by this Court. They should also have their costs of so acting and the fees of their legal advisers (including in respect of their petition which is now refused) paid from the assets of the Bank on the usual indemnity basis, to be taxed if not agreed.

22. The costs of the JVLs, the Controllers and those of the Depositors (once so proven to be) are also to be paid from the assets of the Bank, as discussed and agreed in Open Court; also to be taxed if not agreed as to quantum.


Hon. Anthony Smellie
Chief Justice



12th February 2015

Ruling: CALEDONIAN BANK LIMITED - FSD 22 of 2015

Coram: The Hon Anthony Smellie, Chief Justice. Date: 11th & 12th Feb 2015