COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

COMMERCIAL DIVISION

2013/COM/bnk/0088

IN THE MATTER OF THE COMPANIES ACT Ch. 308 Statute Laws of The Bahamas, 2009 Edition

IN THE MATTER OF THE BANKS AND TRUST COMPANIES REGULATION ACT Ch.316 Statute Laws of The Bahamas, 2009 Edition

IN THE MATTER OF RURAL INTERNATIONAL BANK LIMITED

Before: The Honourable Madam Justice Indra H. Charles

Appearances: Mrs. Simone Morgan-Gomez with her Ms. Philisea Bethel of Callenders & Co. for Dupuch & Turnquest
Mr. Sean Moree and Mrs. Erin Hill of McKinney Bancroft & Hughes for the Joint Official Liquidators
Present also is Mrs. Beatrice Miranda, Registered Associate, McKinney Bancroft & Hughes and Mrs. Maria Ferere, Official Liquidator

Hearing Dates: Heard on written submissions on 30 April 2021 and Reply Submissions on 7 May 2021

Taxation of costs – Indemnity costs - Whether the Liquidators' Summonses constitutes a sanction application as defined in the Company Liquidation Rules, Order 11 rule 1(1)(a) or an application for directions - Whether D&T is entitled to indemnity costs- Whether D&T's fees and expenses were reasonably and properly incurred.

Costs –Order for costs – *Calderbank* offer made five months before hearing – Offer exceeded what court awarded – Validity of *Calderbank* offer – Offer gave less than 21 days to respond – No payment into court – Was offer genuine – Was offer good – Costs – Standard basis - Exaggerated claims – Factors to be considered in awarding costs – Who bears the costs of the action – Costs in a "mixed result" case – Split cost order.

After a Ruling delivered on 16 February 2021 which became effective on 2 March 2021, the parties could not agree on the issue of costs. On the day of the delivery of the Ruling, the Court stated that neither party was wholly successful and ordered

the parties to try to resolve this issue. The Court further stated that should the parties be unable to do so, there shall be liberty to apply for further directions. As the parties are unable to resolve this vexing issue, the Court is now tasked to do so. The key issue is whether D&T is entitled to indemnity costs which it now seeks.

HELD: Finding in favour of the Liquidators, the Court makes a "Split Cost Order", whereby (i) D&T will get its costs on a standard basis from 6 February 2019 (the date when Callenders filed an Appearance on their behalf) to a generously reasonable time of 21 August 2019 for acceptance of the *Calderbank* offer (date when the parties appeared and there was a hearing of some preliminary matters) pursuant to the D&T Bill of Costs and (ii) from 22 August 2019 until 16 February 2021 (date of the Oral Ruling), D&T will bear their own costs and those of the Liquidators on a standard basis. Neither of the costs relating to (ii) are to be paid out of the assets of RIBL.

1. Part II of Order 24 of the Companies Liquidation Rules and not the Rules of the Supreme Court is the applicable regime to deal with costs in liquidation proceedings. To the extent that the RSC are applicable, the CLR expressly provide for such circumstances.

2. Under CLR O. 24 rule 11 (1), the taxing master (Registrar) and not a judge shall tax costs in liquidation proceedings. CLR O. 24 rule 11(2) provides that any party who is dissatisfied with the taxing master's decision may apply to a Judge for a review of the taxing master's decision. Therefore, this Court does not have jurisdiction to tax costs in liquidation proceedings.

3. The Liquidators are officers of the Court. Under the Court's inherent jurisdiction, the Court can hear the Liquidators' Summonses, which constituted an application for directions. The contention that the Liquidators' Summonses are sanction applications is meritless and must fail. The issue that if the Liquidators Summonses are sanction summonses then costs ought to be paid out on an indemnity basis does not arise for consideration given my finding. The cases of **Re Edennote Ltd; Tottenham Hotspur plc and others v Ryman and another** [1996] 2 BCLC 389, 393; **In the matter of Gulf Union Bank (Bahamas) Limited (In Liquidation) v In the matter of The Companies Act, 1992** [2012] 3 BHS J. No. 95 and **Re Angel Group Ltd and other companies** [2016] 2 BCLC 509 at [27] relied upon. See also: CLR O. 11, r. 1(1)(a) and Part 1 of the Fourth Schedule of the Companies (Winding Up Amendment) Act, 2011 (the "CWUAA"). The case of **In the matter of Pacifico Global Advisors Ltd** [2019/COM/bnk/00077) considered.

4. Although not defined in the CLR or the CWUAA, a "creditor" is a person who has a claim against the debtor and who has submitted a proof of debt in the liquidation and is claiming to be an unsecured creditor of the company rather

than a person who makes a claim outside the liquidation. D&T is not a creditor for the purposes of CLR O. 24, r. 9(4) and the rule does not apply to the fees and expenses of Callenders & Co. See: CLR O. 24 r. 9(4) and O. 16, r. 1(2). Section 9 of the BVI Insolvency Act, 2005 (as amended) considered on the meaning of "creditor".

5. *Calderbank* offers, although they have their origins in English case law and later in UK Civil Procedure Rules, Part 36, of which there is no Bahamian equivalent, are routinely accepted in The Bahamas. The Court will take the *Calderbank* offer into consideration. Although the time period was relatively short and there was no payment into Court, it was a genuine offer and Rural International Bank Limited (In Liquidation) ("RIBL") was good for the money at the time the offer was made. The offer was made by a prominent Queen's Counsel. If D&T felt that it needed more time to seriously consider the offer, it was not beyond their reach to contact Counsel for the Liquidators. In any event, the offer was made about 5 months before the substantive hearing commenced. The Court will give much weight to the offer which was substantially higher than what the Court awarded.

6. This is a perfect case for the Court to make what is termed a "Split Cost Order as opposed to a "mixed result" case: **Hall v Stone** [2007] EWCA Civ. 1354 considered. The terms of the Split Cost Order will be:

    a. D&T will get costs on a standard basis from 6 February 2019 (when Callenders & Co. filed an Appearance on their behalf) to 21 August 2019 (the date originally fixed for commencement of the hearing of the Liquidators' three Summonses for Directions but which had to be adjourned because of preliminary matters. (Since the *Calderbank* offer should have been opened for acceptance for at least 21 days, the Court has generously awarded to D&T extra costs for approximately three months (i.e. from 28 May 2019 to 21 August 2019). Such costs are to be paid out of the assets of RIBL.

    b. From 1 September 2019 (the date the parties appeared before me) until 16 February 2021 (the date of the Oral Ruling), D&T will have to bear their own costs as well as pay the Liquidators' costs and interest on those costs on a standard basis (i.e. the costs of McKinney Bancroft & Hughes). In other words, none of these costs in (b) are to be paid out of the assets of RIBL.

    c. D&T will pay to the Liquidators the costs of this application to be taxed if not agreed.

RULING

CHARLES J:

Introduction

[1] The principal issue before the Court relates to the parties' costs arising from a Ruling of this Court dated 16 February 2021 but effective 2 March 2021 (the "Ruling"). At the date of the delivery of the Ruling, the Court declared that neither party was wholly successful in three Summonses brought by the Joint Official Liquidators (the "Liquidators") of Rural International Bank Limited (In Liquidation) ("RIBL"). At paragraph 87 of the Ruling, the Court ruled that, if the parties are unable to agree on the issue of costs, they shall be at liberty to apply for further directions.

[2] Not having been able to agree on this vexing issue, they seek the assistance of the Court.

[3] By Order of the Court, on 29 November 2019, both parties submitted their respective Bills of Costs which are set out hereunder:

a) The Liquidators' Bill of Costs relating to the Preliminary Objections in the amount of B$45,964.52 (the "First Bill of Costs");

b) The Liquidators' Bill of Costs relating to the issues of liability and quantum in the amount of B$82,199.29 ("the Second Bill of Costs"); and

c) Dupuch & Turnquest ("D&T")'s Bill of Costs in the amount of B$269,721.50 (the "D&T Bill of Costs").

Factual background

[4] D&T were the former Counsel to the Liquidation Committee ("LC") for RIBL. They represented the LC from 21 March 2017 to 19 February 2018. D&T submitted three invoices to the Liquidators in the amount of B$653,741.39. The First D&T Invoice, dated 6 October 2017, was for the amount of B$87,093.55. The Second D&T Invoice dated 9 March 2018 was for

B$252,285.66 and the Third D&T Invoice dated 31 January 2019 was in the amount of B$314,362.18.

[5] As a result of these invoices, the Liquidators filed three Summonses on 21 February 2018, 2 May 2018 and 7 February 2019 respectively (the "Liquidators' Summonses") seeking principally (i) directions on whether any part of the fees and expenses set out in the three D&T invoices of B$653,741.39 should be paid out of the assets of RIBL as an expense of the liquidation; and (ii) in the event that the Court directed that any part of the D&T Invoices should be paid, a taxation of the fees and expenses set out therein under Order 9, rule 5(4) of the Companies Liquidation Rules, 2012 (the "CLR").

[6] D&T raised the following two preliminary objections to the Liquidators' Summonses (the "Preliminary Objections"):

(i) the Consent Order filed on 17 January 2019 (the "Consent Order") created an estoppel, precluding the Liquidators from seeking the directions of the Court on the issue of liability to pay the D&T Invoices out of the estate of RIBL as an expense of the liquidation (the "Estoppel Issue"); and

(ii) by the inclusion of the last recital and the operative paragraph 7 in the Consent Order, the Liquidators effectively abandoned the issue of liability to pay the D&T Invoices (the "Recital Issue").

[7] In the Ruling, the Court held that both of D&T's Preliminary Objections were unsustainable. With regard to the Estoppel Issue, the Court found that the Consent Order did not operate as an estoppel. With regard to the Recital Issue, the Court held that (a) recitals are non-operative terms which assist with the background and interpretation of an order or a document and are unenforceable; and (b) to the extent that a recital conflicts with an operative provision, the operative provision prevails.

[8] The Ruling next addressed the issue of RIBL's liability to pay the D&T Invoices out of its assets as an expense of the liquidation. The Court held that D&T were duly appointed by the LC to act as its Counsel and, as such, RIBL was liable to pay all of D&T's legal fees and expenses which were reasonably and properly incurred from the date of their appointment on 21 March 2017 until the termination of its appointment by an Order of Court made on 19 February 2018.

[9] The Court then undertook a taxation of the D&T Invoices. Despite the D&T Invoices totaling B$653,741.39 in the aggregate (inclusive of 15% VAT), the Court found that only the sum of B$206,702.21 is payable to D&T out of RIBL's estate as an expense of the liquidation. This sum included VAT as that has always been the thinking of the Court.

Issues raised in the submissions of both parties

[10] Distilling the written submissions of both parties, the following issues arise for consideration:

1. Whether Part II of Order 24 of the Companies Liquidation Rules ("CLR") or the Rules of the Supreme Court, 1978 ("RSC") apply to costs in liquidation proceedings?

2. Whether the Liquidators' Summonses are Summons for Directions or Sanction Summonses?

3. If they are sanction applications, whether D&T's Bill of Costs dated 29 November 2019 ("D&T Bill of Costs") ought to be paid on an indemnity basis?

4. Whether the statutory indemnity in CLR Orders 9 and 25 precludes the use of an issue-based indemnity taxation?

5. Whether D&T 's costs ought to be paid out of the estate of RIBL just as the Liquidators costs are paid out of the estate of RIBL?

6. Whether the *Calderbank* offer from the Liquidators was valid?

7. Whether D&T acted unreasonably when it refused the purported *Calderbank* offer?

8. Whether costs are payable by any of the parties and if so, which of the parties will be ordered to pay costs to the other? and

9. Whether the legal costs claimed are unreasonable and should be borne by D&T?

Issue 1- Costs in liquidation proceedings

[11] Learned Counsel Mr. Moree submitted that, in dealing with costs in liquidation proceedings, the general rule on costs, specifically Section 30(1) of the Supreme Court Act and Order 59 rule (2)(2) and rule 3(2) of the Rules of the Supreme Court, 1978 (the "RSC") applies.

[12] Learned Counsel Mrs. Morgan-Gomez appearing as Counsel for D&T correctly pointed out that the Companies Liquidation Rules ("CLR") and particularly Part II of Order 24 (Costs in Liquidation Proceedings) is the applicable regime to deal with costs in liquidation proceedings.

[13] She submitted that CLR O. 1 r. 2 states that the CLR apply to every application in a winding up and the old Companies (Winding up) Rules cease to apply. Throughout the CLR, there are references to specific RSC being applicable in specified circumstances. Mrs. Morgan-Gomez also submitted that in stating that the CLR provide the primary cost rules for liquidation proceedings and, in enacting the CLR, it must have been the intention of Parliament that liquidation proceedings are governed by its own rules and take priority over the RSC.

[14] Part II of Order 24 of the CLR and not the RSC is the applicable regime to deal with costs in liquidation proceedings. To the extent that the RSC are applicable, the CLR expressly provides for such circumstances.

[15] In fact, Order 1 rule 2 of the Rules of the Supreme Court, 1978 (the "RSC") expressly provides that these rules (RSC) **shall** not apply to proceedings relating to the winding up of companies. RSC O. 1 r.2 states:

> **"These r*ules shall have no effect in relation to* proceedings of the kinds specified in the first column of the following Table (being proceedings in respect of which rules may be made under enactments specified in the second column of that Table) –**
>
> | ***Proceedings*** | ***Enactments*** |
> |---|---|
> | **2. Proceedings relating to the winding up of companies** | **Companies Act, Part VII"** |

[16] The CLR states which of the RSC can be applied in instances involving taxations. CLR O. 24 deals with costs in liquidation proceeding. CLR O 24, r 7 is the interpretation section. It provides:

> **"(1) "Costs" shall mean the reasonable legal fees and expenses incurred by a person in conducting or participating in a liquidation proceeding in an economical, expeditious and proper manner.**
>
> **(2) "Liquidation proceeding" shall mean –**
>
> **(a) ……**
>
> **(b) any application to court in a proceeding commenced under Part VII of the Act; and**
>
> **(c) …..**
>
> **(3) Words and expressions defined in the RSC Order 59, rule 1 shall have the same meaning when used in Part II of this Order."** [Emphasis added]

[17] CLR O. 24 r.11 provides that:

> **"(1) In the event that an order for costs made in a liquidation proceeding is required to be taxed, it shall be taxed by the taxing master in accordance with the provisions of the RSC O. 59 rr.19-25.**
>
> **(2) Any party who is dissatisfied with the amount of any costs certificate may apply to a Judge to review the taxing master's decision in accordance with the provisions of RSC Order 59, rule 33."**

[18] Although a taxing master is not defined under the provisions of the CLR, it surely could not mean a "Judge" as CLR O. 24 r. 11(2) provides for anyone who is dissatisfied may apply to a Judge to review the taxing master's decision.

[19] RSC O. 59 r.1 does provide a definition for "taxing master" as meaning the Registrar.

[20] The CLR also state that with respect to taxation of costs in liquidation proceedings, costs **shall** be taxed by the taxing master who is the Registrar. Since the CLR are the applicable rules to tax costs in liquidation proceedings, the Registrar of the Supreme Court is empowered to tax those costs. I shall therefore refer the taxation of these costs to the Registrar.

[21] Having found that I do not have the jurisdiction to tax costs in liquidation proceedings, I shall turn my attention to address the other issues.

Issues 2 and 5: Sanction Summonses or Summonses for Directions and whether D&T's costs ought to be paid on indemnity basis and out of assets of RIBL?

[22] Issues 2 - 5 are inter-related and are dealt with together. Mrs. Morgan-Gomez argued that the three Summonses filed by the Liquidators constitute sanction applications as defined by CLR O. 11, r. 1(1) (a) and are not Summonses for Directions, as argued by Counsel for the Liquidators. Therefore, says Mrs. Morgan-Gomez, D&T's costs of retaining Callenders & Co. are to be taxed on an indemnity basis and payable out of the assets of RIBL. Further, if, the Summonses are not deemed sanction applications, then none of the RSC can be relied upon for this taxation process and only CLR O. 9, r. 5 and O. 25 could be relied upon to guide the Court. Those CLR Orders refer to the indemnity basis for taxation proceedings.

[23] Counsel next argued that CLR O. 24 expressly governs "applications to court under Part VII of the Act" which refers to the Companies Winding Up Amendment Act, 2011 (the CWUAA") which states at Section 2 that it

constitutes “Part VII (of the Companies Act) - Winding Up Of Companies”. The only way in which a liquidation can proceed in The Bahamas is under the CWUAA. RIBL is a liquidation under the CWUAA. CLR O. 24 governs RIBL’s court applications in the RIBL liquidation court proceedings. CLR O. 24 does not recognize “summons for directions” which is the terminology used by the Liquidators for their three Summonses filed in the RIBL liquidation proceedings. Mrs. Morgan-Gomez’ contended that the Liquidators’ argument that their three Summonses are somehow outside of CLR O. 24 and are not sanction applications is wholly without merit.

[24] Part II of CLR O. 24 concerns costs in liquidation proceedings and consists of O. 24, rr. 7-11, CLR O. 24 r. 7(2) states that liquidation proceedings consist of Petition applications, any application made to the Court in a liquidation action and any appeal against an order made on a petition or an order made in any proceeding of an action under the CWUAA. Part II of CLR O. 24 continues to cite proceedings that are liquidation proceedings as petitions to wind up and sanction applications. Sanction applications are defined in CLR O. 11, r. 1 as including applications by a liquidator for an order sanctioning his exercise or proposed exercise of a power contained in “Part 1 of the Fourth Schedule *or* ***otherwise****”.* [Emphasis added]

[25] Mrs. Morgan-Gomez submitted that the RIBL proceedings is an action under the CWUAA because it concerns the liquidation of a company. Therefore, any hearing in the RIBL court action qualifies as a liquidation proceeding. The Liquidators’ Summonses are not petitions to wind up RIBL. Therefore, the Liquidators’ Summonses are sanction applications which is the only other type of liquidation proceeding.

[26] According to Mrs. Morgan-Gomez, the Liquidators’ insistence that the hearings of the Liquidators’ Summonses are ‘directions hearings’ is not supported by any law and they do not cite the legal grounds which give the Court jurisdiction to hear the summonses. The only grounds on which the Court has jurisdiction to hear a summons in a liquidation proceeding is if it is

a sanction application. Any other application, other than the winding up petitions, would be contrary to the intent of Parliament when it passed Part II of CLR O. 24. She submitted that Summonses for Directions existed under RSC O. 25 but they do not exist anymore since the introduction of RSC O. 31 A. As she submitted, RSCO. 31 A concerns case management and preparation for trial and when other rules conflict with RSC O. 31A, RSC O. 31 A shall prevail. Therefore, there are no more summons for directions applications under the RSC and they do not exist under the CLR.

[27] Further, says Mrs. Morgan-Gomez, 'a directions hearing' is a sanction hearing because the Liquidators are asking the Court to grant an order sanctioning/directing/approving liability which is or is not owed to D&T and either payment or non-payment of monies to D&T.

[28] Counsel further argued that if the Liquidators' three Summonses are not deemed sanction applications then none of RSC O. 59 can be relied upon for this taxation process since the three Summons are filed in the liquidation action and constitute liquidation proceedings governed by the CLR as expressly stated therein by Parliament. Only CLR O. 9, rule 5 and O. 24 would be relevant and they refer to taxations on an indemnity basis.

[29] She submitted that the Liquidators' Summonses are sanction applications. Anything else would be contrary to Parliament's intent in passing Part II of CLR O. 24. Since the Liquidators' Summonses are sanction applications O.24, r.11 applies and RSC O.59, rr.19-25 also apply to this taxation.

[30] Mr. Moree disagreed with the arguments and submitted that paragraphs 1, 17, 18, 19 and 39 of the Ruling explicitly and correctly stated that the Liquidators' Summonses constituted an application for directions. For clarity, I was merely referring to the applications which were before the Court for consideration.

[31] Mr. Moree next referred to CLR O. 11, r. 1 which defines a sanction application as:

"(1) Any application to the court made by –

(a) the official liquidator for a[n] order sanctioning his exercise or proposed exercise of any power conferred upon him by Part I of the Fourth Schedule to the Act or otherwise; or

(b) a creditor or contributory for an order directing the official liquidator to exercise or refrain from exercising any of his powers in a particular way" [Emphasis added]

[32] Part I of the Fourth Schedule (the "Schedule") to the CWUAA headed "*Powers exercisable with sanction*" refers to section 205 of the CWUAA (dealing with the duties, functions and powers of official liquidators) and lists the following powers which are exercisable by an official liquidator with the sanction of the court:

"1. Power to bring or defend any action or other legal proceeding in the name and on behalf of the company.

2. Power to carry on the business of the company so far as may be necessary for its beneficial winding up.

3. Power to dispose of any property of the company to a person who is or was related to the company.

4. Power to pay any class of creditors in full.

5. Power to make any compromise or arrangement with creditors or persons claiming to be creditors or having or alleging themselves to have any claim (present or future, certain or contingent, ascertained or sounding only in damages) against the company or for which the company may be rendered liable.

6. Power to compromise on such terms as may be agreed all debts and liabilities capable of resulting in debts, and all claims (present or future, certain or contingent, ascertained or sounding only in damages) subsisting, or supposed to subsist between the company and a contributory or alleged contributory or other debtor or person apprehending liability to the company.

7. Power to deal with all questions in any way relating to or affecting the assets or the winding up of the company, to take

any security for the discharge of any such call, debt, liability or claim and to give a complete discharge in respect of it.

8. The power to sell any of the company's property by public auction or private contract with power to transfer the whole of it to any person or to sell the same in parcels.

9. The power to raise or borrow money and grant securities therefor over the property of the company.

10. Power to disclaim onerous property."

[33] Part II lists a number of powers that liquidators can exercise without sanction including the power to engage staff (whether or not as employees of the company) and empowers liquidators to perform a number of duties without sanction, for example, the power to do all other things incidental to the exercise of their powers.

[34] Mr. Moree pointed out that, in the list enumerating the powers which are exercisable by an official liquidator with the sanction of the court, no mention is made of the payment of the invoices of Counsel to a LC. He submitted that had the fees and expenses set out in the D&T Invoices been reasonably and properly incurred pursuant to CLR O. 9, rule 5(3), the Liquidators would have been obliged to pay such invoices out of RIBL's estate without the sanction of the court. I agree. I myself find the fees and expenses of B$653,741.39 which D&T racked up in roughly 19 months to be remarkable. The first two invoices amounted to B$339,379.21 for fees and expenses incurred by D&T as fees and expenses for less than 8 months' engagement. Then, on 31 January 2019, D&T submitted a Third Invoice in the sum of B$314,362.18 for fees and expenses incurred from 5 March 2018 to 31 January 2019. These fees and expenses were allegedly incurred after the Court had, on 19 February 2018, ordered that D&T's engagement be deferred until the election of two additional members of the LC. Instead of obeying the Order of the Court, D&T allegedly continued to accumulate fees and expenses of B$314,362.18. To my mind, the Liquidators, as officers of the Court, acted properly when they came to court to seek directions as to whether an inflated amount of B$653,741.39 should be paid out of the assets of RIBL. They had

no other alternative. Had the Liquidators not done so, they might have been censured by the Court.

[35] Mr. Moree further submitted that, while CLR O.11,r. 1(1)(a) also contains the words "*or otherwise"*, in his view, any additional powers conferred upon a liquidator, the exercise of which requires the sanction of the court, would have to be *ejusdem generis* as the powers which are explicitly listed in Part I of the Schedule. In that regard, he referred to the English Court of Appeal case of **R (on the Application of G) v Westminster City Council** [2004] EWCA Civ 45 where Lord Phillips MR, in delivering the Judgment of the Court, construed the words "or otherwise" in a statute and stated that:

> **"[42] This conclusion is supported by the 'ejusdem generis' canon of construction, which is no more than an approach which gives a word the natural meaning that it bears having regard to its context.**
>
> **[44] This meaning of 'otherwise' also accords well with the overall scheme of the legislation".**

[36] In this regard, Mr. Moree submitted that the payment of invoices of a liquidation committee's Counsel, which does not require the sanction of the court, does not fall into the same category as the powers listed in Part I of the Schedule, which explicitly require such sanction. Accordingly, says Mr. Moree, it would not have made sense for the Liquidators to make a sanction application in respect of the D&T Invoices as alleged in the D&T Submissions.

[37] Mr. Moree also relied on the case of **In the matter of Pacifico Global Advisors Ltd.** Supreme Court Action 2019/COM/bnk/00077. In that case, McKay J held, among other things, that the application by the official liquidator was not a sanction application, as the term "assets" in section 7 of Part I of the Schedule did not include assets which did not belong to the company. She also held that the power to defray liquidation costs and expenses was not included in the powers which the official liquidator sought to have sanctioned.

[38] In my judgment, the three Summonses seeking directions of the Court do not fall within the definition of a sanction application provided for in CLR O.11 r.1. Furthermore, Part I of the Schedule to the CWUAA headed "*Powers exercisable with sanction*" refers to section 205 of the CWUAA and lists specific powers which are exercisable by an official liquidator with the sanction of the court. The Liquidators' Summonses for Directions on whether any of the fees and expenses claimed by D&T are payable out of the assets of RIBL do not fall within any of those powers.

[39] Moreover, there is no reference in CLR O. 9 r. 6 to CLR O. 11 of sanction applications. Instead, there is an explicit reference to a taxation in accordance with CLR O. 25.

[40] In paragraphs 23 to 29 of the D&T submissions, Mrs. Morgan-Gomez argued that, in Bahamian liquidation proceedings, the Companies Act (as amended by the CWUAA) and the CLR only provide for winding up petitions and sanction applications but not for any other court applications, such as an application for directions.

[41] While it appears so, the Court, in its inherent jurisdiction may hear applications for directions from liquidators. Official liquidators, as officers of the court, are subject to the control of the court which can exercise such control by making orders and giving directions upon its officers making applications for directions. The liquidators are appointed to act for the benefit of all creditors and if, in the course of doing so, they encounter difficulties, they are duty bound to come to court and seek directions. If, at the date of their appointment, the Order did not expressly state so, then it is implied that they may approach the court, at any time, to seek directions.

[42] The fact that liquidators can make applications to the court seeking directions is emphasized in the UK Court of Appeal case of **Re Edennote Ltd; Tottenham Hotspur plc and others v Ryman and another** [1996] 2 BCLC 389 where Nourse LJ made the following observations in respect of the English Insolvency Act 1986 at p. 393:

> **"… Section 167(3) provides, first, that the exercise of the liquidator's powers is subject to the 'control' of the court and, secondly, that any creditor or contributory may apply to the court with respect not only to any 'proposed exercise' but also to any 'exercise' of any of those powers. It is therefore plain that the court can control a past exercise of the powers and can, if appropriate, undo a transaction to which it has led. In any event, the notion that creditors and contributories should be able to seek the directions of the court in an uncontroversial way is a curious one. That would be the function of the liquidator, who, where the company is being wound up in England and Wales, has an express power to do so under s 168(3)."** [Emphasis added]

[43] Also, **In the matter of Gulf Union Bank (Bahamas) Limited (In Liquidation) v In the matter of The Companies Act, 1992** [2012] 3 BHS J. No. 95, the Joint Official Liquidators sought directions from the Court pursuant to Rule 33 of the Companies (Winding-Up) Rules of 1975 and/or under the inherent jurisdiction of the court on numerous issues arising in the liquidation. There was no challenge to the court's jurisdiction, and the late Stephen Isaacs J gave detailed directions to the Joint Official Liquidators.

[44] Rose J in **Re Angel Group Ltd and other companies** [2016] 2 BCLC 509, [2015] EWHC 3624 (Ch) made the following observations in [27] of the judgment:

> **"Three possible bases are put forward for the power of the court to make such an order. First, s 168(3) of the Insolvency Act provides that the liquidator may apply to the court in the prescribed manner for directions in relation to any particular matter arising in the winding up. Secondly, s 231 of the Insolvency Act applies where there are joint office-holders, including joint liquidators, and provides that the appointment may declare whether any act required or authorised under any enactment to be done by the liquidators shall be done by all or by any one or more of the persons appointed. Mr Fisher submits that the general obligation to conduct the liquidation in accordance with the provisions of the Act, including Sch 4 to the Act, is an act required or authorised under any enactment to be done so that the court can declare that the liquidators should perform that act in accordance with the terms of the MOU. Thirdly, Mr Fisher submits that the court has an inherent jurisdiction to control the actions of its officers to ensure that they conduct the liquidation in the interest of the creditors by avoiding conflicts of interest that may arise."**[Emphasis added]

[45] It is evident from these authorities, that the Court, under its inherent jurisdiction, can hear the Liquidators' Summonses, which constituted applications for directions by the Liquidators in their capacity as officers of the court. It is trite that if in doubt, liquidators, as officers of the Court, can seek directions of the Court when exercising their duties and powers.

[46] Overall, the arguments advanced by Mrs. Morgan-Gomez that the Liquidators' Summonses are sanction applications are meritless and must fail. The next issue raised that if the Liquidators Summonses are sanction summonses then costs ought to be paid out on an indemnity basis does not arise for consideration given my finding (above).

[47] Even if the Court is wrong to come to the above findings, I will now focus on whether or not D&T are creditors of RIBL for the purpose of CLR O. 24, r. 9(4).

[48] In her submissions, Mrs. Morgan-Gomez argued that, the fees and expenses of Callenders for representing D&T should be paid out of RIBL's assets under CLR O.24, r. 9(4), which deals with the costs of sanction applications and is in the following terms:

> **"In the case of a sanction application which is made or opposed by a creditor or contributory, the general rule is that-**
>
> (a) **his costs of successfully making or opposing the application should be paid out of the assets of the company, such costs to be taxed on an indemnity basis if not agreed with the official liquidator; …"** [Emphasis added]

[49] Mrs. Morgan-Gomez further submitted that, contrary to the Liquidators' argument that D&T is not a creditor of RIBL for the purposes of CLR O.24, r.9 (4) or otherwise, and therefore the legal fees and expenses of Callenders & Co. are not payable out of the assets of RIBL, the Court did award D&T B$206,702.21 payable from the assets of RIBL. According to her, such an argument is far-fetched. She next submitted that the process afforded to the Liquidators under CLR O. 9 and 25 does not require D&T to submit a proof

of debt. Similarly, neither have the Liquidators or Counsel representing them ever submitted a proof of debt to get paid out of the liquidation and that D&T's fees are payable out of the assets of RIBL just as the Liquidators' fees are. Put shortly, the Liquidators are Officers of the Court and have a duty to ensure that the company's assets are realised and distributed to the creditors and if there is a surplus, to distribute it to the contributories. D&T's appointment does not come close to that of the Liquidators so it seems bizarre that D&T places itself in the same class as the Liquidators.

[50] That said, it is a fact that the word "creditor" is not defined in the CLR or the CWUAA. However, the Court could take judicial notice of other financial jurisdictions such as the BVI. Section 9 of the BVI Insolvency Act, 2005 (as amended) defines "creditor" as:

> **"(9) (1) A person is a creditor of another person (the debtor) if he has a claim against the debtor, whether by assignment or otherwise, that is, or would be, an admissible claim in:**
>
> **(a) the liquidation of the debtor, in the case of a debtor that is a company or a foreign company; or**
>
> **(b) The bankruptcy of the debtor, in the case of a debtor who is an individual.**
>
> **(2) A creditor is a secured creditor of a debtor if he has an enforceable security interest over an asset of the debtor in respect of his claim.**
>
> **(3) An unsecured creditor is a creditor who is not a secured creditor."**

[51] In CLR 16, r. 1(2), the following is stated:

> **"Where a company which is insolvent or of doubtful solvency is being wound up by the court, a person claiming to be a creditor of the company and wishing to recover his debt must (subject to rule 7) submit his claim in writing to the official liquidator and is referred to as 'proving' for his debt and the document by which he seeks to establish his claim is referred to as his 'proof' or 'proof of debt'."**

[52] Therefore, a "creditor" is a person who has a claim against the debtor and who has submitted a proof of debt in the liquidation and is claiming to be an unsecured creditor of the company rather than a person who makes a claim outside the liquidation. As D&T contended that the fees and expenses included in the D&T Invoices should be paid out of the assets of RIBL in full, they were not claiming to be an unsecured creditor in the RIBL liquidation who receives *pari passu* distributions.

[53] I therefore find that D&T is not a creditor of RIBL for the purposes of CLR O.24, r. 9(4) and the rule does not apply to the fees and expenses of Callenders & Co.

[54] As Mr. Moree correctly suggested, the absurdity of the argument becomes clear when considering that the RIBL liquidation is badly insolvent. So far only one interim dividend of 15% has been paid to admitted creditors who either submitted a proof of debt in time to participate in such dividend or for whose claims a provision was made. If D&T were admitted as a creditor in the RIBL liquidation and a provision had been made in respect of their claim, they would only receive 15% of the amount awarded to them in the Taxation Order (B$206,702.21), which equals B$31,005.33.

[55] In addition, D&T cannot claim for the amount of B$206,702.21 to be paid out of the assets of RIBL in full, and at the same time contend to be a creditor in the RIBL liquidation so that its costs of opposing a "sanction application" (which the Liquidators' Summonses were not) are paid out of RIBL's estate on an indemnity basis under CLR O. 24, r. 9(4). The Liquidators contended that if D&T wish to submit a proof of debt in the RIBL liquidation for the sum of B$206,702.21 instead of seeking payment of that amount in full, the Liquidators would be more than happy to consider it.

Issues 6 - 8: Validity of the *"Calderbank"* offer and whether it was unreasonably refused. Split Cost Order or not?

[56] A *Calderbank* offer is a term used to describe an offer made without prejudice save as to costs. This term is named after a matrimonial case (**Calderbank**

v Calderbank [1976] Fam. 93; [1975] 3 All ER 333) in which that device was first used. The term is commonly applied to any offer outside Pt. 36 of the Civil Procedure Rules (UK)": per Jackson LJ in **Fox v Foundation Piling Ltd** [2011] EWCA Civ. 760 (at [4]).

[57] Such an offer is privileged from discovery until the costs stage of proceedings and is then used as an indication of each party's co-operation to settle. Therefore, the consequence of not accepting a *Calderbank* offer is that "…*if a party is then to advance its case further, it does so at the peril of having to compensate the other party making the offer by way of* ***full indemnity legal costs*** *if, at trial, the offer is not bettered":* Lyons J in **Deveaux v Bank of the Bahamas Limited** [2006] 1 BHS J. No. 58 at [32].

[58] The hearing of the Liquidators' Summonses for Directions were to commence on 7 February 2019 but this date was adjourned, at the request of Callenders & Co., who had only entered an appearance on 6 February 2019. The Court acceded to Callenders & Co's request and an order to that effect was filed on 19 February 2019. The substantive hearing was to commence on 21 August 2019 but that date had to be vacated because of preliminary matters raised by the parties. The substantive hearing got underway on 18 October 2019.

[59] On 24 May 2019, approximately five months prior to the substantive hearing of the Liquidators' Summonses on 18 October, 2019, Mr. Brian M. Moree, QC (on behalf of the Liquidators) sent a letter to Mr. Terence R. H. Gape of D&T, offering the sum of BB$275,000 (inclusive of VAT) in full and final settlement of the D&T Invoices (the "*Calderbank* Offer"). The last paragraph of the Settlement Offer was in the following terms:

> **"This settlement offer is made without prejudice save as to costs. Accordingly, should the Judge make an order that BB$275,000.00 or less is payable to Dupuch & Turnquest in respect of their three invoices, the Liquidators have instructed us to seek a cost order against Dupuch & Turnquest personally."**

[60] The *Calderbank* Offer was not accepted by D&T prior to its expiration on 28 May 2019 nor was any attempt made by D&T to accept the offer after its expiration.

[61] Stripped to its bare essentials, Mrs. Morgan-Gomez submitted that the *Calderbank* offer was ineffective and should have no bearing on the court's discretion as to costs. According to her, *Calderbank* offers are premised on UK case law and, unlike the RSC, the CLR mandates that costs be paid out of the assets of the liquidation as regards the liquidators, their Counsel and Counsel to the LC, that is, D&T. Therefore, the *Calderbank* concept has no place in Bahamian liquidation proceedings since it is in contravention of the express provisions of the CLR. Alternatively, she argued that, the offer is of no effect because (i) the Liquidators should have made a payment into court as D&T's claim is purely a money claim; (ii) the time period for considering the offer was less than 21 days and (iii) the offer expressly excluded legal fees.

[62] On the other hand, Mr. Moree argued that the *Calderbank* offer was perfectly valid. According to him, it is not correct to say that the *Calderbank* offer "…*did not include terms as to costs"* or "…*did not factor in legal costs*". He stated that, in fact, as admitted in paragraph 124 of the D&T Submissions, the *Calderbank* Offer specifically stated as follows:

> **"As the Liquidators do not believe that the fees of Callenders & Co. are payable out of RIBL's estate, no additional sum is offered in settlement of such fees."**

[63] Mr. Moree submitted that the *Calderbank* offer made it abundantly clear that the amount offered in respect of the fees incurred by Callenders & Co. was zero.

[64] Mr. Moree also disagreed with the submissions of D&T that the *Calderbank* concept has no place in Bahamian liquidation proceedings. In this regard, Counsel relied on a plethora of cases including two Bahamian cases of **Smith v Aquapure Water Limited** [2009] 1 BHS J. 24 and **Deveaux v Bank of the**

Bahamas Limited [2006] 1 BHS J. No. 58 to bolster his argument that ***Calderbank*** offers are not restricted to family division proceedings (from which they originate) but such offers were given universal application even in The Bahamas. He referenced **Smith v Aquapure** (supra) as such an example and that a payment into court is appropriate in simple money claims. The headnote of that case reads:

> **"An offer of settlement made before the trial of an action and contained in a letter written 'without prejudice' but expressly reserving the right to bring the letter to the notice of the judge on the issue of costs after judgment in the action if the offer is refused is admissible on the question of costs, without the consent of both parties to the action, in all cases where what is in issue is something more than a simple money claim in respect of which a payment into court would be the appropriate way of proceeding. Such a letter should not be used as a substitute for payment into court, where a payment in is appropriate, and if so used should not be treated as carrying the same consequences as a payment in**."

[65] Despite the fact that *Calderbank* offers have their origins from UK case law and later in the English Civil Procedure Rules (Part 36) (similar rules are in the making in The Bahamas but have not been implemented as yet), the Courts in The Bahamas have been proactive and have accepted their use. In fact, it matters not what nomenclature is ascribed to it, be it a *Calderbank* offer or an offer to settle, the Courts routinely encourage parties to settle ahead of trial if they can. The Courts will however ensure that, when making such offers, all the pre-requisites associated with such an offer are met. In the UK, for example, CPR Part 36, Order 10 states:

> **"(1) If a person makes an offer to settle before proceedings are begun which complies with the provisions of this rule, the court will take that offer into account when making any order as to costs.**
>
> **(2) The offer must:**
>
> > **(a) be expressed to be open for at least 21 days after the date it was made;**
> >
> > **(b) if made by a person who would be a defendant were proceedings commenced, include an offer to pay costs of the offeree incurred up to the date 21 days after the**

date it was made; and

(c) otherwise comply with this Part.

(3) If the offeror is a defendant to a money claim –

(a) he must made a Part 36 payment within 14 days of service of the claim form; and

(b) the amount of the payment must be no less than the sum offered before proceedings began;

(4) ……"

[66] As I stated, it ought to be common ground that *Calderbank* offers can exist in Bahamian liquidation proceedings but certain pre-conditions ought to be satisfied for these offers to be valid. Those pre-conditions are best illustrated in the case of **Trustees of Stokes Pension Fund v Western Power Distribution (South West) plc** [2005] 3 All ER 775; [2005] EWCA Civ 854. At [23] – [26], Dyson LJ said:

> **"[23] How should the discretion accorded by rr 36.1(2) and 44.3(4)(c) be exercised in relation to an offer made to settle a money claim where the claimant recovers less than the amount of the offer? In the absence of any guidance in the rules, it falls to the courts to provide it. I emphasise that it is a matter for the discretion of the court. It is clear from r 36.3(1) that the offer cannot automatically have the costs consequences specified in Pt 36. The question, therefore, is what weight should be given to an offer made to settle a money claim.**
>
> **[24] In my judgment, an offer should usually be treated as having the same effect as a payment into court if the following conditions are satisfied (I consider the effect of a withdrawal at [32]–[42], below). First, the offer must be expressed in clear terms so that there is no doubt as to what is being offered. It should state whether it relates to the whole of the claim or to part of it or to an issue that arises in it, and if so to which part or issue; whether it takes into account any counterclaim; and if it is expressed not to be inclusive of interest, giving details relating to interest equivalent to those set out in r 36.22(2). This condition does no more than reflect the requirements specified in r 36.5(2) in relation to payments into court. Secondly, the offer should be open for acceptance for at least 21 days and otherwise accord with the substance of a Calderbank offer. Thirdly, the offer should be genuine and not, to use the words of Waller LJ 'sham or non-serious in some way'. Fourthly, the**

defendant should clearly have been good for the money at the time when the offer was made.

[25]To the extent that any of these conditions is not satisfied, the offer should be given less weight than a payment into court for the purposes of a decision as to the incidence of costs. Where none of the conditions is satisfied, it is likely that the court will hold that offer affords the defendant no costs protection at all.

[26] But if all of the conditions to which I have referred are met, then I can see no reason in principle why the effect of an offer should differ from that of a payment into court. Simon Brown LJ mentioned the need to promote clarity and certainty. I agree. That is why an offer which is unclear and uncertain will usually not carry the same weight as a payment into court. But an offer which satisfies the four conditions should by definition be no less clear or certain than a payment into court. It is important to emphasise that the purpose of a payment into court is not to provide the claimant with security for his judgment if he succeeds at trial. It is to encourage settlement. As Lord Woolf said, a payment into court is 'a useful way of assuring claimants of the substance of an offer', and thereby encouraging them to settle by accepting the money that has been paid into court. If a claimant has no less assurance as to the substance of an offer than where a payment into court has been made, there is no reason to treat the offer as providing any less encouragement to settle or to treat it differently from a payment into court".

[67] To summarize, Dyson LJ held that an offer made to settle a money claim should usually be treated as having the same effect as a payment in court if the following four conditions are satisfied:

1. The offer must be expressed in clear terms so that there is no doubt as to what is being offered. It should state whether it relates to the whole of the claim or to part of it or to an issue that arises in it, and if so to which part or issue;

2. The offer should be open for acceptance for at least 21 days and otherwise accord with the substance of a *Calderbank* offer.

3. The offer should be genuine and not, to use the words of Waller LJ 'sham or non-serious in some way'.

4. The defendant should clearly have been good for the money at the time when the offer was made.

[68] The Liquidators argued that, their three Summonses did not constitute a simple money claim since they sought directions on whether any part of the fees and expenses set out in D&T's invoices should be paid out of the assets of RIBL as an expense in the liquidation and if that was the case, a taxation of the fees and expenses.

[69] By letter dated Friday, 24 May 2019, the Liquidators made an offer of B$275,000 in full and final settlement of D&T's three invoices. Now, they say that it is not a claim for the payment of the D&T invoices. This seems to be a circuitous argument. The argument that the First Liquidators' Summons, which was filed on 21 February 2018, was for directions on the future course of the engagement of D&T by the Liquidation Committee and on the persons authorized to provide instructions in respect of such engagement was not a live issue at the date of their offer. Shortly put, the three invoices by D&T were for fees and expenses. In other words, D&T's claim is a pure money claim.

[70] Mrs. Morgan-Gomez emphasized that the *Calderbank* offer gave D&T a mere 4 days to accept by *"end of business on Tuesday, 28th May 2019"* failing which the offer would be withdrawn. The offer was not accepted by D&T and according to her, such rejection was reasonable and prudent. She emphasized that, considering the weekend, the length of acceptance time was only 2 business days to contemplate the offer when the law is clear that the offer should be open for acceptance for at least 21 days.

[71] Learned Counsel urged the Court not to give any weight to the *Calderbank* offer which was open only for a mere 2 business days and therefore, it was not a genuine offer of compromise since the offer did not factor in legal costs that would have accrued up to the time of the offer. According to Counsel, by May 2019, both the Liquidators and D&T had exchanged submissions

regarding liability and quantum and were awaiting a trial date from the Court. This is not so but I will carry on. Counsel submitted that by May 2019, D&T had incurred costs on its own and through its attorneys, Callenders & Co. who entered an appearance on 6 February 2019 and had appeared before the Court on 7 February 2019. As to D&T's fees, the Liquidators expressly stated that "*as the Liquidators do not believe that the fees of Callenders & Co. are payable out of RIBL's estate no additional sum is offered in settlement of such fees."* In other words, as Mr. Moree submitted, the *Calderbank* offer made it abundantly clear that the amount offered in respect of the fees incurred by Callenders & Co. was zero.

[72] Next, Mrs. Morgan-Gomez contended that the Liquidators should have made a payment into court instead of making a purported *Calderbank* offer.

[73] In **Amber v Stacey** [2001] 2 All ER 88, CA, after the commencement of proceedings, the defendant wrote offering £4,000 plus costs but made no payment into court. In August 1998, the defendant paid in £2,000 and this was topped up to £3,000 in January 1999. At the end of the trial in April 1999, the claimant was awarded £2,300. *The judge concluded the claimant had acted unreasonably in refusing the original offer of £4,000 and awarded the defendant his costs from that date.* The Court of Appeal held that the judge was wrong to award the defendant his full costs of the period before the payment into court of £3,000. He had ignored the important difference between a Part 36 offer and a Part 36 payment. Nevertheless, because of the claimant's unreasonableness, it was appropriate to award the defendant half his costs for the period before the payment in. The court identified the following advantages of payments into court: (a) genuineness; (b) the offeror's ability to pay; (c) whether the offer is open or without prejudice and (d) the terms on which the dispute was settled. Simon-Brown LJ said: "*They are clearly to be encouraged and written offers, although obviously relevant, should not be treated as precise equivalents"*.

[74] In **Trustees of Stokes Pension Fund** [supra], the Court of Appeal held that an offer by a clearly solvent defendant to settle a money claim should usually be treated as having the same effect as a payment into court if the offer was expressed in clear terms, was open for acceptance for at least 21 days and otherwise accorded with the substance of a *Calderbank* offer, was a genuine offer and if the defendant was good for the money when the offer was made. To the extent that any of those conditions was not satisfied the offer should be given less weight than a payment into court for the purposes of a decision as to the incidence of costs. Where none of the conditions was satisfied it was likely that the court would hold that the offer afforded the defendant no costs protection at all.

[75] In the present case, the Liquidators made a *Calderbank* offer in the amount of B$275,000 on 24 May 2019 in full and final settlement of the three invoices. The Offer was expressed in clear terms for 4 days (2 working days). D&T did not accept the offer and although partly successful in its claim recovered **less** than the Liquidators' offer. D&T recovered B$206,702.21 in the aggregate (inclusive of 7.5% VAT) which was less than the *Calderbank* offer of B$275,000 which was made by the Liquidators.

[76] CPR Rule 36.3(1) (UK) preserves the principle that a defendant to a money claim must make a payment into court if it is to have effective costs consequences. In other words, a defendant must put his money where his mouth is, for the offer to have full effect. If RIBL was solvent, then the offer by a clearly solvent defendant to settle a money claim would have been treated as having the same effect as a payment into court: **Trustees of Stokes Pension Fund**. Although RIBL is insolvent today, according to Mr. Moree, (see paragraph 57 of the Submissions dated 30 April 2021), I would be struggling with the idea that a *Calderbank* offer made by a prominent Queen's Counsel in May 2019 was not genuine. In other words, I do not believe that the offer was a sham or insincere in some way. In addition, although there was no payment into court, I am of the opinion that RIBL was good for the money at the time that the offer was made.

[77] In **Codent Ltd v Lyson Ltd** [2005] EWCA Civ 1835, [2005] All ER (D) 138 8 December, the Defendant Company was sued for breach of contract. It issued a counter claim and made a *Calderbank* offer to pay £100,000.00 in full and final settlement of the claim and to waive its counterclaim and to pay the costs of the action. The offer was refused. The Claimant was successful but failed to beat the offer at trial. The Claimant argued that the offer was ineffective as it could have been supported by a payment into court. The Judge agreed. The Defendant appealed. It was held that the costs judge was wrong to rule that the defendant should get no benefit from its offer because it could have made a Part 36 payment into court. He had been in error to proceed on the basis that either the offer had full effect or no effect at all. He did not consider whether an intermediate (middle) position was possible and therefore, erred in principle. Account had to be taken of the fact that the offer was not made more than 21 days before the trial and that it was not left open for 21 days. The correct order in light of the offer was that the claimant should have 70% of its costs of the action up to the first day of the trial and the defendant have its costs thereafter.

[78] Then in **Jackson v Ministry of Defence** [2006] All ER (D) 14, the Claimant issued proceedings for personal injury against the Ministry of Defence ("MOD") for injury suffered during a training exercise. He advanced substantial claims for damages for future loss of earnings and for specially adapted accommodation based on his account of his residual disability. Those claims were abandoned when the medical evidence did not support the claims reducing his claim from over £1 million to £240,000. The MOD made a CPR Part 36 payment into court for £150,000. The Defendants were ordered to attend a pre-trial joint settlement meeting. The meeting was unsuccessful. At trial the Claimant was awarded £155,000. The Judge reduced the Claimant's costs by 25% to reflect the fact that the award had only just beaten the payment into Court and also to reflect the fact that the Claimant had exaggerated his evidence. The MOD appealed on the basis that the reduction should have been greater to reflect the increase in costs that had been caused by the exaggeration and that the Judge should have

taken into account the joint settlement meeting. The Court held that the order made was well within the judge's wide discretion.

[79] I alluded to the above cases to show that even if all of the conditions are not present in a *Calderbank* offer, it does not mean that the offer is invalid. The Court, in the exercise of its discretionary powers, determines what weight it should give to it and the percentage reduction (if any) of D&T's costs as well as the Liquidators' costs. The Court does not have to proceed on the basis that either the *Calderbank* offer had full effect or no effect at all. The judge can consider whether there is an intermediate position: **Codent Ltd v Lyson Ltd** [supra].

[80] In the present case, the major defect with the *Calderbank* offer was that it had not been open for acceptance for at least 21 days. It cannot be disputed that the period of 4 days or 2 working days was unreasonably short. That said, the Court must take into consideration a number of factors including but not limited to the conduct of the parties. In other words, whether it was possible that D&T could have requested an extension of time to consider the *Calderbank* offer once it realized that the period of 4 days was so short.

[81] To my mind, if D&T was really serious about considering the *Calderbank* offer, they could have contacted the author of that letter, Mr. Brian Moree QC and requested additional time. I am confident that their request would have been favourably considered. But, in my considered opinion, D&T was determined to fight for its costs of B$653,741.39. Take for example, the Third Invoice of B$314,362.18 should have never been presented to the Liquidators. Except for one item which, in any event, should have found its way in the Second Invoice, the Third Invoice relates to purported fees and expenses for the period when the Court ordered that their engagement be deferred. In my view, the mere production of that invoice to the Liquidators spoke volumes. As I expressed, the Liquidators had no alternative but to seek the directions of the Court. They cannot be faulted for doing so and should not be sanctioned by this Court in making cost orders against them. That

would be a travesty. Indeed, the Courts have time and again cautioned parties to litigation that if proceedings which ought to be settled are dragged on, costs consequences would flow. In other words, our courts have always encouraged litigants to settle. So, to the point, D&T had many days and months and even years to settle if they wanted to do so but D&T was ready to do battle for the remarkable sum of B$653,741.39.

[82] Exaggeration of fees and expenses indicate conduct meriting criticism: **Morton v Portal Ltd** [2010] EWHC 1804. Gone are the days when parties could exaggerate their claims and then be seen as paragons of virtue as the language of cost rules requires the court to have regard to the conduct of all parties before, during and after the proceedings: **Bank of Tokyo-Mitsubishi UFJ Ltd v Baskan Gida Sanayi Ve Pazarlama As** [2009] EWHC 1696 (Ch), **Lillian McPhee (As Administrator of the Estate of Thelma Mackey) v Warren Stuart** [2010/CLE/gen/00798] –Bahamas Judiciary Website 2018 Judgments citing **Scherer v Counting Instruments Ltd** [1986] 2 All ER 529 at pp. 536-537. The rules are routinely used by our courts so conduct before, during and after litigation is relevant and has a place in Bahamian jurisprudence.

[83] All things considered, in my considered opinion, I will give great weight to the *Calderbank* offer which, if it were accepted, would have saved time and expense to all parties including the Liquidators.

"Split cost" order or costs in a "mixed result" case

[84] Pursuant to the Order dated 14 April 2021 and filed on 26 April 2021 ("the "Taxation Order"), D&T is entitled to be paid B$206,702.21 (exclusive of VAT) which is substantially less that the amount of B$275,000 (Inclusive of VAT, says Mr. Moree) offered by RIBL in the *Calderbank* offer. I agree with Mr. Moree that, pursuant to the exception provided for in RSC O. 59, r. 3(2), and since neither party was wholly successful that the Court ought to make a split order as reflected below.

[85] Both parties submitted the following Bills of Costs on 29 November 2019 namely:

1. The Liquidators' Bill of Costs relating to the Preliminary Objections in the amount of B$45,954.52 (the "Liquidators' First Bill of Costs";

2. The Liquidators' Bill of Costs relating to the issues of liability and quantum in the amount of B$82,199.29 (the "Liquidators' Second Bill of Costs");

3. D&T's Bill of Costs in the amount of B$269,721.50 (the "D&T Bill of Costs")

[86] The Liquidators submitted that the Court should make the following Split Order for Costs:

a. D&T will get costs on a standard basis from 6 February 2019 (when Callenders & Co. filed an Appearance on their behalf) until 28 May 2019 (the end of the period for acceptance of the *Calderbank* offer; and

b. From 29 May 2019 (the day after the *Calderbank* offer expired) until 2 March 2021 (the effective date of the Ruling), D&T will have to bear not only their own costs (i.e. none of Callenders' costs during that period are to be paid out of RIBL's assets), but also the Liquidators'' costs and interest on those costs on a standard basis (i.e. the costs of McKinney, Bancroft & Hughes).

[87] The Liquidators asserted that, without challenging the exaggerated D&T Bill of Costs for B$269,721.50, which is more than double the Liquidators' First and Second Bill of Costs, the Split Order will result in the following costs being awarded (not including disbursements):

a. D&T would get their costs for the period 6 February 2019 – 28 May 2019 in the amount of B$82,792.00 pursuant to the D&T Bill of

Costs;

b. The Liquidators would get all of the costs in the First Bill of Costs in the amount of B$38,725.00 (on the basis that all professional fees charged therein were incurred after 29 May 2019);

c. The Liquidators would get their costs for the period 29 May 2019 to 18 November 2019 in the amount of B$50,225.00 pursuant to the Second Bill of Costs; and

d. The Liquidators would also get their costs for the period 19 November 2019 to 2 March 2021 which have not been quantified.

[88] According to Mr. Moree, even without considering the Liquidators' costs for the period 19 November 2019 to 2 March 2021, this calculation will result in a net balance of B$6,158.00 payable to RIBL by D&T. Mr. Moree asserted that the net balance to RIBL would be much greater if the Court were to scrutinize D&T's Bill of Costs, which is grossly inflated.

[89] Mr. Moree next submitted that an alternative method of awarding costs would be to consider a "mixed result" case where it is not immediately apparent who is the clear victor and often refers to cases in which more than one issue had to be determined and both parties were successful on different issues.

[90] At paragraphs 36 to 63, D&T comprehensively addressed the issue of costs in a "mixed result" case. Mrs. Morgan-Gomez asserted that the Liquidators argued that they were partial victors regarding liability and they should be paid 68.38% of their liability costs but this reflected a misguided application of "mixed" result analysis since the allocation is based on issues and not the size of the difference between what is claimed and what was awarded. She insisted that D&T is the successful party and is not liable to pay the Liquidators' costs as the same are payable out of the assets of RIBL.

[91] D&T submitted that this is not a proper case for the Court to make a split costs order. D&T should be paid for the costs of pursuing the preliminary

objections because even though it lost, it won on liability. D&T asserted that the assertion by the Liquidators that this is a "mixed result" case is frivolous at best: **Hall and others v Stone** [2007] EWCA Civ. 1354.

[92] If I comprehend D&T's arguments well, firstly, D&T insisted that their costs should be paid on an indemnity basis. The Court has already determined that the Liquidators' Summonses are not sanction summonses and indemnity costs do not arise unless D&T can demonstrate that the Liquidators' conduct can be considered egregious or where the conduct can be properly categorized as disgraceful or deserving of moral condemnation: **Levine v Callenders & Co. et al** [1998] BHS J. No. 75 – per Sawyer CJ at page 4.

[93] Secondly, D&T submitted that if its argument relating to CLR indemnity costs fails, then D&T should still be granted indemnity costs based on RSC O. 59, rr. 26 and 27 (Assessment of Costs and costs payable to an attorney by his own client) or alternatively, on a standard basis because D&T succeeded on liability, succeeded on monies being owed to them despite the Liquidators arguing zero monies were owed and the reduction from what D&T claimed to what was awarded is not itself evidence of deleterious behaviour to justify being deprived of costs.

[94] As indemnity costs are not applicable to the facts of the present case, the Court will consider whether this is a suitable case for an award of costs to either or both parties on a standard basis or whether indeed, as the Liquidators suggested, costs should be awarded because of the mixed results in this case.

[95] A "mixed result" case refers to one in which it is not immediately apparent who is the clear winner and often refers to cases in which more than one issue had to be determined and both parties were successful on different issues. D&T does not support the "mixed result" cost order.

[96] Without delving too much further into this matter and acknowledging D&T's position that this is not a case for a "split cost" order or a "mixed result" case,

but a case for D&T to be paid indemnity costs, I will opine that this is a perfect case for me to make a split order for costs. A 'mixed result" order appears to be more detrimental to D&T so, in the exercise of my discretionary power, I will refrain from doing so.

[97] My Order will be:

a. D&T will get costs on a standard basis from 6 February 2019 (when Callenders & Co. filed an Appearance on their behalf) to 21 August 2019 (the date originally fixed for commencement of the hearing of the Liquidators' three Summonses for Directions but which had to be adjourned because of preliminary matters. (Since the *Calderbank* offer should have been opened for acceptance for at least 21 days, the Court has generously awarded to D&T extra costs for approximately three months (i.e. from 28 May 2019 to 21 August 2019). Such costs are to be paid out of the assets of RIBL.

b. From 1 September 2019 (the date the parties appeared before me) until 16 February 2021 (the date of the Oral Ruling), D&T will have to bear their own costs as well as pay the Liquidators' costs and interest on those costs on a standard basis (i.e. the costs of McKinney Bancroft & Hughes). In other words, none of these costs in (b) are to be paid out of the assets of RIBL.

c. D&T will pay to the Liquidators the costs of this application to be taxed if not agreed.

[98] The CLR state that with respect to taxation of costs in liquidation proceedings, costs **shall** be taxed by the taxing master who is the Registrar. I shall therefore refer the taxation of costs to the Registrar. It is my hope though, that these parties will come to some sensible resolution rather than inundate the Court with meandering arguments as was evident in this application.

Engaging Callenders & Co.

[99] D&T engaged Callenders & Co. to argue their case for them so D&T ought to pay fees and disbursements to retain counsel. The Liquidators, as officers of the Court, conducted these proceedings in the best interest of RIBL's unsecured creditors. They sought guidance of the Court when they were faced with exaggerated invoices. This was proper. One of their duties is to retain counsel to assist them with the conduct of this liquidation so they are not in the same position as D&T. D&T does not have any contractual right to the payment of any costs much less on an indemnity basis from RIBL's assets.

Dated this 24th day of August, 2021

Indra H. Charles
Justice