THE INTERNATIONAL INSOLVENCY & RESTRUCTURING REVIEW 2021/22

Beaumont Capital Markets

KEY DEVELOPMENTS & THE LATEST TRENDS IN THE BAHAMAS – FROM A LEGAL PERSPECTIVE

The insolvency legislation in The Bahamas

In 2011 and 2012 the insolvency legislation in The Bahamas was completely revamped by the enactment of the following Act and Rules:

(i) The Companies (Winding Up Amendment) Act, 2011;
(ii) The International Business Companies (Winding Up Amendment) Act, 2011;
(iii) The Companies Liquidation Rules, 2012 (the "**CLR**");
(iv) The Insolvency Practitioners' Rules, 2012; and
(v) The Foreign Proceedings (International Cooperation) Liquidation Rules, 2012.

The procedure for the liquidation of companies incorporated under the Companies Act of 1992 (as amended by the Companies (Winding Up Amendment) Act, 2011, the "**Companies Act**") and under the International Business Companies Act of 2000 (the **"IBC Act**") is now almost identical in that section 89 of the IBC Act (as amended) states that "*[a] company incorporated under this Act may be wound up under any of the circumstances, insofar as they are applicable to a company incorporated under this Act, in which a company incorporated under the Companies Act, Ch. 308 may be wound up and subject to the provisions of this Part the provisions of the Companies Act relating to winding up and dissolution shall apply mutatis mutandis to the winding up and dissolution of the company*". Accordingly, the CLR apply to both types of company.

Section 205(3) of the Companies Act divides the powers necessary to carry out the duties and functions of an official liquidator into those which may only be exercised with the sanction of the court (specified in Part I of the Fourth Schedule) and those which may be exercised either with or without such sanction (specified in Part II of the Fourth Schedule). If the sanction of the court is required, the official liquidator would make a sanction application under CLR Order 11. CLR Order 24, rule 9 deals with the costs of a sanction application.

There are currently before the Supreme Court of The Bahamas two insolvency cases dealing with those matters and with liquidation committees, which were also introduced by the CLR.

Recent judicial decisions

A. In the matter of Rural International Bank Limited – 2013/COM/bnk/0088

This case dealt with the question as to whether the professional fees and expenses charged by counsel to the liquidation committee of Rural International Bank Limited (In Liquidation) (the "**Committee**") should be paid out of the assets of the company as an expense of the liquidation under CLR Order 9, rule 5(3) on the basis that they had been reasonably and properly incurred.

Beatrice E. Miranda
Partner

Qualified Swiss attorney admitted to the Bar of Zurich. She has also been admitted as a Solicitor of the Supreme Court of England and Wales and is qualified to practice law in The Bahamas. Beatrice is also a member of STEP.
She has worked around the world in Switzerland, Australia and The Bahamas. Her work has an international element with clients in The Bahamas, South America, North America and Europe. She is fluent in English, German and Spanish, speaks French and also understands Italian and Portuguese.
Beatrice has managed complex multi-jurisdictional liquidations for years, working closely with attorneys on different continents. Since August 2020 Beatrice has been working remotely from Switzerland, supporting her clients in the same way as before. Beatrice has built up a very strong reputation and long-lasting relationships with her clients, having worked at McKinney, Bancroft & Hughes for over two decades.

Vanessa L. Smith
Partner

Experienced in trust, insolvency, corporate, commercial, and civil litigation. With the keen ability to maintain open lines of communication, she is a reliable and trustworthy legal ally. Passionate about engaging with others, Vanessa endeavours to understand her clients' objectives to provide the best service possible in an efficient and cost-effective manner. Her clients include high-net worth individuals resident in different jurisdictions and young Bahamian entrepreneurs who seek Vanessa's innovative advice in relation to financial services and corporate matters. Vanessa also advises insolvency practitioners on all aspects of restructuring and insolvency law in The Bahamas and frequently appears before the Supreme Court of The Bahamas in major court-supervised liquidations in the jurisdiction.

Vanessa is a member of the Membership Committee of the Restructuring and Insolvency Specialists Association (Bahamas) and the International Association of Restructuring, Insolvency & Bankruptcy Professionals.

In a Ruling delivered on 16 February 2021 the judge held that, although the engagement letter was not signed by all of the members of the Committee, counsel thereto was nonetheless duly appointed by a valid resolution of the Committee. Unlike in the case of the official liquidator's legal counsel, there is no mandatory requirement of an engagement letter for counsel to the liquidation committee. Although the fees and expenses incurred by counsel to the Committee during a certain period of time were reasonably and properly incurred, so that they ought to be paid out of the assets of the company as an expense of the liquidation, the judge disallowed numerous items which had been questioned by the joint official liquidators in their application for directions.

The judge made no findings with regard to the issue of the parties' costs, which is also contentious and may have to be decided by the court at a later date. This matter will depend, *inter alia*, as to whether the joint official liquidators' application is considered to be an application for directions (as contended by them) or whether it is a sanction application. In the latter case, it is possible that the costs of successfully opposing the application (i.e. the legal fees incurred by outside counsel to the Committee's counsel) would have to be paid out of the assets of the company on an indemnity basis under CLR Order 24, rule 9(4)(a).

B. In the matter of Pacifico Global Advisors Ltd. – 2019/COM/bnk/00077

(i) The official liquidator's first application relating to his costs

In a Ruling dated 17 September 2020 the judge dealt with an application by the official liquidator of Pacifico Global Advisors Ltd. (In Liquidation) for an order sanctioning, *inter alia*, the deduction of a portion of the general liquidation costs from assets which were held in segregated accounts of an investment fund into which the company's clients had invested.

The judge first addressed whether the application by the official liquidator was a sanction application, which had a bearing on which parties had a right of audience. She held that the application was not a sanction application, as the term assets in section 7 of Part I of the Fourth Schedule of the Companies Act (which deals with an official liquidator's power to deal with all questions in any way relating to or affecting the assets or the winding up of the company) 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.

With regard to the right of audience, the judge held that both the receiver and manager over certain sub-funds and the administrator of the investment fund were mandated to liquidate and disburse the assets of the fund and thus had a sufficient interest in the hearing to give them the right of audience. The judge further found that the liquidation committee had the right to be heard on the basis that it was an interested party.

The judge found that the assets held by the company in the segregated accounts had not become trust assets of the company as submitted by the official liquidator. She directed that those assets be released by the company and disbursed in accordance with orders previously made by the court. Consistent with the rule that costs follow the event, the judge ordered the official liquidator to personally bear the other parties' costs.

(ii) The official liquidator's second application relating to his costs

In a Ruling dated 9 March 2021 another judge determined a further application by the official liquidator in the same proceedings. This time, the official liquidator sought an order allowing him to recover general liquidation costs from other assets, which stood in the name of the company, but were held on trust for its clients. The judge allowed the official liquidator to deduct from the trust assets the costs incurred by him which were solely attributable to the identification, realisation, preservation, protection, recovery, distribution and administration thereof, subject to those costs being in accord with the fees which the company would have levied if it had not been placed into liquidation.

However, the judge did not consider the official liquidator's request to also deduct from the trust assets a percentage of the balance of the liquidation costs which were not solely attributable to those assets, as the official liquidator had not identified the specific percentage for the requested deduction. The judge stated that, if he were required to make a determination at this stage, the deduction could not exceed 15% of the trust assets. The judge also denied the official liquidator's request for him, his team and his lawyers to receive a payment on account of costs.

The impact of COVID-19

In response to the COVID-19 pandemic, the Government of The Bahamas declared a state of emergency and rolled out a COVID-19 fiscal stimulus response plan in March 2020.

With a faltering economy in the aftermath of Hurricane Dorian in September 2019 and a temporary shutdown of all businesses with the exception of specific essential services, the 2020/2021 budget effective 1 July 2020 aptly labeled "Resilient Bahamas: A Plan for Restoration" contained a commitment to not increasing taxes.

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To date the Government has implemented, *inter alia*, the following initiatives to assist ailing businesses in the private sector:

- Expansion of unemployment benefits under the national insurance program to self-employed persons although they are not typically eligible to receive such benefits;
- 3-6 month payment deferral program by domestic commercial banks and credit unions against the repayment of loans for businesses or individuals in good standing who were negatively impacted by the pandemic (interest will continue to accrue during the deferral period);
- Business Continuity Loan Program to assist micro, small and medium enterprises with operating costs; loans range from $5,000.00 to $300,000.00 and offer a repayment grace period of 4 months;
- Tax Credit & Tax Deferral Employment Retention Program to aid all qualifying VAT registered businesses with a turnover in excess of $100,000.00 and hotels to provide payroll support and encourage employee retention; and
- Establishment of an Economic Recovery Committee (the "**ERC**") to research and develop strategic recommendations to inform the Government's policies in addressing the impact of the COVID-19 pandemic on the economy.

In its report in the last quarter of 2020 the ERC recommended the modernisation of the insolvency regime in The Bahamas. The ERC's position is that the bankruptcy laws are antiquated, near punitive and non-rehabilitative in that they do not help with the financial recovery of an insolvent individual. While the ERC's opinion is that the insolvency laws governing companies are modern, they are incomplete as they lack a rehabilitative component. Together the insolvency regime results in prolonged hardship for insolvent individuals and the loss of insolvent enterprises. The ERC recommends the following to aid in economic recovery:

- Repeal of the Bankruptcy Act and replacement thereof with a modern insolvency regime for individuals and amendment of the Companies Act to introduce 'corporate rescue' procedures; and
- Suspension of the filing of any bankruptcy proceedings against individuals and compulsory liquidation proceedings against companies for a prescribed period with respect to insolvencies due to the current economic crisis.

While the Government has committed to reviewing the ERC's recommendations, no steps have been taken to amend the current insolvency regime. Currently, there is no restriction on the filing of winding up petitions under the Companies Act. Further, the statutory prescribed minimum of $1,000.00 for a statutory demand against companies has not increased, and it is possible for a winding up petition to be presented against a company which has failed to respond to a statutory demand within 21 days of being served with the same. The Supreme Court of The Bahamas, which has the power to grant a winding up order, is operating as normal, utilising virtual courtrooms via video conferencing platforms.

Directors of companies and business-owners must continue to act cautiously as the "clawback" provision in the Companies Act remains in force and has not been extended or suspended as a result of the COVID-19 pandemic. Accordingly, every transfer of property or charge thereon, payment obligation or judicial proceedings incurred or taken by any company in favour of any creditor at a time when the company is unable to pay its debts with a view to giving that creditor a preference over the other creditors shall be invalid if it occurred within the 6 months immediately preceding the commencement of a liquidation. Furthermore, an official liquidator has two years to commence an action to seek to set aside every disposition made at an undervalue by or on behalf of a company with intent to defraud its creditors.

Director liability for insolvent trading remains an issue despite the COVID-19 pandemic, and company directors must take every step reasonably open to them to minimise the loss to the company's creditors in the event that they know or ought to have known that there was no reasonable prospect that the company would avoid being wound up by reason of insolvency. Directors may incur personal liability for insolvent trading whereby they would be required to make a contribution to the company's assets.

Conclusion

The insolvency jurisprudence in The Bahamas has continued to evolve since the introduction of the insolvency legislation in 2011 and 2012, which courts have grappled with interpreting. The Liquidation Rules Committee is currently considering amendments to the CLR, which are expected to resolve any practical problems which have arisen since the implementation thereof.

While the insolvency legislation has not taken into consideration the hardships experienced by companies during the COVID-19 pandemic, it will be interesting how the regime develops to reflect the difficult financial situation in The Bahamas.

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McKINNEY BANCROFT & HUGHES
COUNSEL & ATTORNEYS

SMART SOLUTIONS DELIVERED BY EXPERIENCED SPECIALISTS

Our restructuring and insolvency specialists have been involved in some of the largest liquidations and company reorganizations in The Bahamas. The extensive experience of our lawyers provides them with the ability to innovatively address the needs of our clients by delivering practical solutions to complex matters.

McKINNEY, BANCROFT and HUGHES is one of the largest and oldest firms in The Bahamas and conducts an extensive international and domestic practice from its offices in the cities of Nassau and Freeport.

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