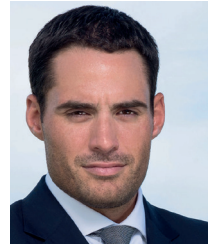


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Insolvency & restructuring in The Bahamas – A case study on costs in insolvency proceedings



by Sean N. C. Moree and Vanessa L. Smith, McKinney, Bancroft & Hughes

Recently the Supreme Court of the Commonwealth of The Bahamas handed down a comprehensive Ruling on the issue of costs in liquidation proceedings - *In the Matter of Rural International Bank Limited – 2013/COM/bnk/0088*. This helpful decision clarifies the position relating to the taxation of costs in insolvency proceedings in The Bahamas, the entitlement to costs of the attorney of the Liquidation Committee and the treatment of *Calderbank* offers within the context of insolvency proceedings.



Background

Former Counsel (“Former Counsel”) to the Liquidation Committee (“the LC”) of Rural International Bank Limited (In Liquidation) (“RIBL”) submitted three invoices to the Joint Official Liquidators of RIBL (“the Liquidators”) for fees and expenses related to their representation of the LC from March 2017 to February 2018. The submitted invoices were dated October 6, 2017, March 9, 2018 and January 31, 2019 totalling B\$653,741.39 (“the Invoices”).

The Liquidators filed three Summonses (“the Summonses”) seeking directions on: (i) whether any part of the fees and expenses set out in the Invoices should be paid out of the assets of RIBL; and (ii) if any part of the Invoices should be so paid, a taxation of the fees and expenses in accordance with the insolvency regime in The Bahamas.

Former Counsel raised numerous preliminary objections to the Summonses, which the Court found unsustainable. Charles J. (“the Judge”) held that only Former Counsel’s legal fees and expenses which were reasonably and properly incurred from the date of their appointment until the date of their termination were to be paid out of the assets of RIBL. The Court undertook a taxation of the Invoices and ordered B\$206,702.21 to be paid out of RIBL’s estate.

While some monies were payable to Former Counsel, albeit less than the claim, neither the Liquidators nor Former Counsel were wholly

successful in the Summonses. The parties were unable to agree on the issue of costs and sought the Court’s directions on the following:

- (1) Whether Part II of Order 24 of the Companies Liquidation Rules, 2012 (“CLR”) or the Rules of the Supreme Court, 1978 (“RSC”) is the applicable statutory regime for costs in liquidation proceedings.
- (2) Whether the Summonses constituted summonses for directions or sanction applications.
- (3) If sanction applications, whether Former Counsel’s costs on the Summonses ought to be paid on an indemnity basis?
- (4) Whether the statutory indemnity in Orders 9 and 25 of the CLR precludes an issue-based indemnity taxation.
- (5) As the Liquidators’ costs are paid out of the assets of RIBL, should Former Counsel’s costs be paid out of the RIBL estate?
- (6) Whether a valid *Calderbank* offer was made by the Liquidators.
- (7) Whether Former Counsel acted unreasonably when it refused to accept the *Calderbank* offer.
- (8) Whether the legal costs claimed are unreasonable and should be borne by Former Counsel.

Costs in liquidation proceedings

Liquidation of companies in The Bahamas is governed by the Companies Act of 1992 (as amended by the Companies (Winding Up)

Amendment Act, 2011 (“CWUAA”)) and its subsidiary legislation, the CLR. Order 1 rule 2 of the RSC, the rules of Court for civil matters in the Supreme Court of The Bahamas, expressly provides that it shall not apply to proceedings relating to the winding up of companies. However, Order 24 of the CLR expressly states when the RSC are to be applied in taxations in insolvency proceedings.

Order 24 of the CLR states that an order for costs made in a liquidation proceeding shall be taxed by the taxing master in accordance with Order 59 of the RSC. ‘Taxing master’ is not defined in the CLR. Charles J held that it cannot mean a judge as Order 24 rule 11 of the CLR provides that an application can be made to a judge to review the taxing master’s decisions. Order 59 of the RSC and section 69 of the Supreme Court Act defines ‘taxing master’ as the Registrar of the Supreme Court.

In summary, the Court held that Part II of Order 24 of the CLR applies to costs in liquidation proceedings. The RSC are only applicable to the extent that the CLR expressly provides. Taxations of costs in liquidation proceedings are within the jurisdiction of the Registrar as taxing master. Accordingly, the Judge did not have the power to tax the costs in respect of the Summonses.

Summons for directions in liquidation proceedings

The Court found that the Summonses did not fall into the definition of a ‘sanction application’ in accordance with Order 11 rule 1 of the CLR as they were not seeking the Court’s sanction of the specific powers exercisable by an official liquidator as listed in Part 1 of the Schedule of the CWUAA.

Although the CWUAA and the CLR only expressly provide for winding up petitions and sanction applications to be made to the Court, the Court in its inherent jurisdiction may also hear applications for directions from liquidators. Official liquidators are officers of the Court and appointed to act for the benefit of all creditors. If, in the exercise of their function, they encounter difficulties, they

have a duty to seek directions from the Court.

Under the Court’s inherent jurisdiction, the Judge was empowered to hear the Summonses brought by the Liquidators in their capacity as officers of the Court.

As the Judge found that the Summonses were applications for directions, the issue of whether Former Counsel’s costs ought to be paid on an indemnity basis did not arise for consideration.

Based on the Judge’s conclusion that the Summonses were not sanction applications, this issue also did not arise for consideration.

Former Counsel’s costs are not treated the same as the Liquidators’ costs

Former Counsel argued that its legal costs should be considered in the same class as fees incurred by counsel for liquidators and paid on an indemnity basis.

The Court found it absurd that Former Counsel would place itself in the same class as the Liquidators. Former Counsel’s appointment was of an entirely different nature. Therefore, Former Counsel could not be treated similarly in terms of having its legal costs taxed on an indemnity basis.

Valid *Calderbank* offer

The term *Calderbank* offer originates from the matrimonial case *Calderbank v Calderbank* [1975] 3 All ER 333. A *Calderbank* offer is made without prejudice save as to costs and privileged from discovery until the costs stage of proceedings. The consequence of not accepting a *Calderbank* offer is that, if a party is to further advance its case, it does so at the peril of having to compensate the party making the *Calderbank* offer by way of full indemnity legal costs if the offer is not bettered at trial.

Although *Calderbank* offers originated from UK case law, later codified in the English Civil Procedure Rules, Bahamian courts have accepted their use and application. While *Calderbank* offers are recognised in Bahamian liquidation proceedings, certain pre-conditions

must be satisfied. The Judge relied on the decision of Dyson LJ in *Trustees of Stokes Pension Fund v Western Power Distribution (South West) plc* [2005] 3 All ER 775 which set out the following pre-conditions:

- (1) the offer is expressed in clear terms so that there is no doubt as to what is being offered;
- (2) the offer should be open for acceptance for at least 21 days;
- (3) the offer should be genuine and not a sham or non-serious in some way; and
- (4) the offeror should have been good for the money at the time when the offer was made.

By letter dated May 24, 2019 the Liquidators made an offer of B\$275,000.00 in full and final settlement of the Invoices, to expire four days (two working days) later on May 28, 2019. Former Counsel did not accept the offer. Ultimately Former Counsel recovered less (B\$206,702.21) than the Liquidators' offer.

Although RIBL is insolvent, the Judge did not find that the offer was a sham or insincere. Even without a payment into Court, she was of the opinion that RIBL had the offered amount available at the time when the offer was made.

The major defect in the Liquidators' offer was that it was not open to Former Counsel for at least 21 days. In the exercise of its discretionary powers, the Court can determine the weight to be given to a *Calderbank* offer. The Court can also consider the conduct of the parties, e.g. whether Former Counsel could have requested an extension of time to consider the *Calderbank* offer. The Judge found the *Calderbank* offer to be valid, but exercised her discretionary powers as to what weight should be placed on it.

Former Counsel acted unreasonably by rejecting the *Calderbank* offer

The Judge placed weight on the conduct of the parties, specifically Former Counsel's failure to

request additional time to consider the *Calderbank* offer. The Court reflected on this failure and opined that Former Counsel was determined to fight for its full costs. Further, the Judge opined that the third invoice in the amount of B\$314,362.18 should have never been presented to the Liquidators as it covered a period when Former Counsel no longer represented the LC. With the presentation of this invoice, the Liquidators had no alternative but to seek the directions of the Court. Accordingly, the Liquidators could not be faulted for doing so and were not sanctioned by the Court in making cost orders against them personally.

Court considers conduct of all parties when making cost orders

The Court must have regard to the conduct of all parties, before, during and after the proceedings when making cost orders. As Former Counsel was only entitled to be paid B\$206,702.21, less than the B\$275,000.00 *Calderbank* offer, and the Court also found that neither party was wholly successful in respect of the Summonses, the Court made a split cost order on the Bills of Costs submitted by both parties.

As Former Counsel's arguments in relation to indemnity costs were not applicable, the Court had to consider whether (i) an award of costs to either or both parties should be made on a standard basis, and (ii) consideration should be given to the mixed results in this case.

A mixed result case arises when it is not immediately apparent which party is the clear winner. It often refers to cases where there is more than one issue to be determined and the parties are successful on different issues considered by the Court. It is within the Court's discretionary powers to order a split order for costs in a mixed result case.

The Judge found that this was a mixed result case, appropriate for a split order for costs. Ultimately, the Court ordered that the costs would be split as follows (all costs to be taxed by the Registrar, if not agreed):

- (1) Former Counsel awarded costs on a standard

basis to be paid out of RIBL's assets from February 6, 2019, when its attorneys filed an appearance on its behalf, to August 21, 2019, the date when Former Counsel raised the preliminary objections in respect of the Summonses. The Court's rationale in allowing costs for approximately three months after the expiration of the *Calderbank* offer was that the offer should have been open for acceptance for at least 21 days. Former Counsel was given additional time within which the matter could have been settled.

- (2) From September 1, 2019, when the Summonses were initially fixed to be heard (although that date was adjourned because of Former Counsel's preliminary objections) to February 16, 2021, the date of the Court's oral ruling on the Summonses, Former Counsel was ordered to bear its own costs and pay the Liquidators' costs together with interest on a standard basis.
- (3) Former Counsel was to pay the Liquidators the costs of the application relating to the parties' costs.

Conclusion

Charles J.'s ruling *In the Matter of Rural International Bank Limited* is the most comprehensive decision on costs in insolvency proceedings in The Bahamas to date. Furthermore, Her Ladyship has ratified the use of *Calderbank* offers in Bahamian insolvency proceedings.

Authors:

Sean N. C. Moree

Partner

snmoree@mckinney.com.bs

Vanessa L. Smith

Partner

vlsmith@mckinney.com.bs

McKinney, Bancroft & Hughes

Mareva House

4 George Street

PO Box N-3937

Nassau, The Bahamas

Tel: +1 242 322 4195

Website: www.mckinney.com.bs