

**IN THE SUPREME COURT OF GRENADA
AND THE WEST INDIES ASSOCIATED STATES
GRENADA**

HIGH COURT OF JUSTICE

CLAIM NO. GDAHCV 2005/0456

IN THE MATTER OF THE COMPANIES ACT NO. 35 of 1994

AND

**IN THE MATTER OF GRENADA TODAY LIMITED
(In Liquidation)**

BETWEEN:

KEITH MITCHELL

Petitioner

and

GRENADA TODAY LIMITED

Respondent

Appearances:

Mrs. Venescia Francis-Banfield for the Petitioner
Mr. Sean Lewis for the Liquidator

2014: January 16, April 14

DECISION

- [1] **MOHAMMED, J.:** Before the Court is an application (“the Application”) to remove the Court-appointed liquidator, Mr. Garvey Louison (“the Liquidator”) forthwith; to replace him with Mr. Rupert Agostini and for the Liquidator to submit and file into Court an audited report of his accounts and/or a report of the assets of Grenada Today Limited (“the Company”).

[2] The facts which give rise to the Application are on: 19th October, 2005 the Petitioner filed a petition to wind-up the Company on the basis that it owed the Applicant the sum of \$191,000.00 pursuant to an award of damages made in High Court action GDAHCV 2001/0333. The Company was ordered to be wound up by Henry J on 27th October, 2009 and the Liquidator, whose name was put forward by the Petitioner, was appointed by the Court and he was directed to exercise all his powers pursuant to the Companies Act¹ ("the Companies Act").

[3] The grounds for the Application are:

- (a) the Liquidator has failed to comply with his duties pursuant to the Companies Act;
- (b) there has been undue delay by the Liquidator to gather and account for the assets of the Company;
- (c) the Liquidator has failed to indicate to the Petitioner the location of the liquid assets of the Company;
- (d) the Liquidator has lost interest in the matter since he has failed to communicate with attorneys for the Petitioner and to attend Court; and
- (e) the Petitioner desires to bring the liquidation to an end and to receive monies due and owing to him.

[4] The Liquidator has opposed the Application and has asked the Court to strike it out for the following reasons:

- (a) there is no evidence from the Petitioner in support of the Application;
- (b) the deponent of the affidavit in support of the Application, Uthlyn George ("the Deponent") is a Legal Secretary who has no interest in the matter and cannot ask the Court for the relief sought;
- (c) he has complied with his duties set out in the Companies Act ; and
- (d) he has not lost interest and has vigorously pursued the matter.

¹ Chapter 58A of the Laws of Grenada

[5] The Application is supported by the affidavit of Uthlyn George² (“the principal affidavit”) and the supplemental affidavit of the said Uthlyn George³ (“the supplemental affidavit”). The Liquidator has filed an affidavit⁴ (“the Liquidator’s principal affidavit”) and a supplemental affidavit⁵ (“the Liquidator’s supplemental affidavit”) in response. On the 30th January, 2014 there was another affidavit filed by Uthlyn George (“the 30th January, 2014 affidavit”). I do not consider that the 30th January, 2014 affidavit is properly before the Court since at the hearing on the 16th January, 2014 I enquired of Counsel for the Petitioner if she required permission to file any affidavit in response to the Liquidator’s supplemental affidavit and she expressly stated that she did not need to file any such response. I therefore made no order granting permission to the Petitioner to file any further and/ or supplemental affidavits in support of the Application. In my view it is an abuse of the process of this Court to allow the Petitioner to rely on the 30th January, 2014 affidavit when no such permission was given especially when it contains information which is highly prejudicial to the Liquidator. For these reasons, the Petitioner is not allowed to rely on the 30th January, 2014 affidavit.

- [6] The issues which arise for determination are:
- (a) What is the test in law to remove the Liquidator?
 - (b) Does the Deponent have standing to make the Application to remove the Liquidator?
 - (c) Has the Deponent shown due cause?
 - (d) Should the Liquidator be removed?

What is the test in law to remove the Liquidator?

- [7] According to section 395 of the Companies Act a Liquidator appointed by the Court may on cause shown be removed by the Court. Neuberger J in **AMP Music**

² Filed on 10th October 2013

³ Filed on 7th January 2014

⁴ Filed 10th January 2014

⁵ Filed 15th January 2014

Box Enterprises Ltd v Hoffman & Anor.⁶ interpreted a similar section in the UK Insolvency Act 1986, which I respectfully adopt. He stated:

“The Court’s power to remove and replace a liquidator is derived from section 108(2) of the Insolvency Act 1986 which is pleasantly short. “The Court may, on cause shown, remove a liquidator and appoint another. As a matter of ordinary principle of statutory interpretation, that seems to me to suggest as follows: (a) the Court has a discretion whether or not to remove and replace the Liquidator, (b) it will do so on good grounds, (c) it is up to the person seeking the order to establish those grounds, (d) whether good grounds are established will depend on the particular facts of a particular case, (e) in general it is inappropriate to lay down what facts will and what facts will not constitute sufficient grounds.”⁷

- [8] In the Caymans Island decision **Johnson and Dinnan v Deloitte Touche**⁸ Telesford Georges JA set out a three-stage process which a Court should use in resolving an application for removal of a liquidator. He stated:

“A review of the cases establishes that the process of resolving an application for the removal of a liquidator raises three stages: (a) Does the Applicant have the locus standi to apply? (b) Had due cause been shown, and (c) If such cause has been shown, should the Court exercise its discretion to remove the liquidators?”⁹

- [9] Applying the interpretation by Neuberger J and the approach by Georges JA it seems to me that in this jurisdiction, any person who moves the Court to have a Court-appointed liquidator removed must establish that he/she is a proper person to make such an application and he/she must adduce evidence to persuade the Court that there are good grounds to exercise its discretion to remove a liquidator.

Does the Deponent have standing to make the Application to remove the Liquidator?

- [10] The Judicial Committee of the Privy Council in **Deloitte & Touche AG v Christopher Johnson and Anor (Cayman Islands)**¹⁰ examined the issue of the

⁶ [2002] EWHC 1899 Ch; [2002] BCC 996

⁷ [2002] BCC 996 at page 1000

⁸ [1997] CILR 120

⁹ Ibid at pages 146-147

¹⁰ [1999] UKPC 25

locus standi of a person who applies to remove a liquidator under section 106 (1) of the Companies Law (1995) Revision which is similar in terms to section 395(1) of the Companies Act. Section 106 (1) provides:

“(1) An official liquidator may resign or be removed by the Court on due cause shown; and any vacancy in the office of an official liquidator appointed by the Court shall be filled by the Court.”

[11] At paragraphs 18, 19 and 20 in **Deloitte & Touche AG v Christopher Johnson and Anor (Cayman Islands)**¹¹ Lord Millett drew a distinction between two different cases when considering the question of a party's standing to make an application to the Court to remove a liquidator. He stated:

“The first occurs when the Court is asked to exercise a power conferred on it by statute. In such a case the Court must examine the statute to see whether it identifies the category of person who may make the application. This goes to the jurisdiction of the Court, for the Court has no jurisdiction to exercise a statutory power except on an application of a person qualified by the statute to make it. The second is more general. Where the Court is asked to exercise a statutory power or its inherent jurisdiction, it will act only on the application of a party with a sufficient interest to make it. This is not a matter of jurisdiction. It is a matter of judicial restraint ...It is, therefore, incumbent on the Court to consider not only whether it has jurisdiction to make the order but whether the applicant is a proper person to invoke the jurisdiction.

19. Where the Court is asked to exercise a statutory power therefore, the applicant must show that he is a person qualified to make the application. But this does not conclude the question. He must also show that he is a proper person to make the application. This does not mean that he “has an interest in making the application or may be affected by the outcome. It means that he has a legitimate interest *in the relief sought*. Thus, even though the statute does not limit the category of persons who may make the application, the Court will not remove a liquidator of an insolvent company on the application of a contributory who is not also a creditor.

20. The standing of an applicant cannot therefore be considered separately and without regard to the nature of the relief for which the application is made.”

[12] It is clear that section 395 (1) of the Companies Act gives the Court a specific statutory power to remove a Court-appointed liquidator, but it fails to set out the

¹¹ [1999]UKPC 25

categories of persons who can have the locus standi to invoke the Court's jurisdiction to make such an order. In the absence of any categories in the Act, the onus is on the Court to determine if the applicant is suitably qualified to make an application or is a proper person to invoke the Court's jurisdiction. In this regard, Lord Millett's guidance that the Court should examine whether the applicant has "a legitimate interest in the relief sought" is the appropriate test to apply in this jurisdiction to determine if an applicant has the locus standi to make such application.

[13] It is undisputed that the Petitioner has not filed an affidavit in support of the Application. It is therefore necessary that the Court examines the principal affidavit and the supplemental affidavit filed in support of the Application to determine if the Deponent has established a legitimate interest in the relief sought.

[14] Part 30.3 of the CPR sets out the requirements which an affidavit must comply with. It states:

“(1) The general rule is that an affidavit may contain only such facts as the deponent is able to prove from his or her own knowledge.

(2) However, an affidavit may contain statements of information and belief:

(a) where any of these Rules so allows; and

(b) where it is for use in an application for summary judgment under Part 15 or any procedural or interlocutory application,

Provided that the affidavit indicates:

(i) Which of the statements in it are made from the Deponent's knowledge and which are matters of information or belief; and

(ii) The source of any matters of information or belief.

(3) The court may order that any scandalous, irrelevant or otherwise oppressive matter be struck out of any affidavit.”

[15] In short, an affidavit is supposed to contain facts which are within the Deponent's own knowledge and belief and where it is not, it must set out the source of the information and belief or it would be hearsay.

[16] In the principal affidavit and the supplemental affidavit the Deponent has made the following allegations against the Liquidator namely:

- (a) that since the date of the Liquidator's appointment he has failed to comply with his duties under the Companies Act;
- (b) that the only work the Liquidator has done since his appointment in 2009 was to cause an application to be filed on the 13th July 2011 seeking an order to summon various persons whom he believed were capable of giving evidence and/or to produce documents in their custody relating to their employment with the Company, on its affairs, list of assets and/or accounts receivables and financials of the Company;
- (c) that since July 2011 the Liquidator has lost interest in the matter and was the sole cause of the undue delay experienced;
- (d) she knows that Counsel has made several unsuccessful attempts to contact the Liquidator by telephone;
- (e) the Liquidator failed to attend Court on the 18th September 2013.
- (f) the Liquidator failed to respond to correspondence and telephone calls; and
- (g) the Liquidator and his staff made certain statements and gave certain assurances.

[17] For each allegation, which was not within her direct knowledge, the Deponent failed to set out who informed her and/or what was the source of her information and belief for making the aforesaid allegations. Even with respect to the allegation of delay, she failed to set out details of such delay.

[18] The Deponent has also made the following allegations based on the Petitioner's belief:

- (a) that the Petitioner fears that the assets of the Company may be dissipated¹²;
- (b) that the Petitioner fears that he will not be able to enjoy the fruits of his labour¹³;

¹² Paragraph 7 of the principal affidavit

¹³ Paragraph 7 of the principal affidavit

(c) that the Petitioner is asking the Court to make an order to remove the Liquidator¹⁴.

[19] However, again the Deponent fails to provide the basis for such allegations such as who and/or what informed her knowledge information and/or belief for making such statements.

[20] In the principal affidavit and the supplemental affidavit the Deponent states that she is a legal secretary. In paragraphs 3- 6 and 8 of the supplemental affidavit she refers to being “informed by Counsel” but she fails to state her place of employment or whether she is employed by the Petitioner, a Law Chambers or otherwise. She fails to depose her authority for swearing the principal affidavit and supplemental affidavit. Indeed there is no evidence that she is authorized to swear the principal affidavit and supplemental affidavit on behalf of the Petitioner or any other person in support of the application. She does not even provide a reason to account for the failure by the Petitioner to file an affidavit in support of the Application.

[21] At best the only authority for the Deponent swearing the principal affidavit is set out at paragraph 2 which states:

“I have the conduct of this file. I handle the filing, searching and serving of all documents pertaining to this file.”

[22] She does not state on whose behalf and the period within which she has been handling the filing, conducting the searching and serving of the documents pertaining to the file or does she indicate if she has been involved with this matter since the date of the appointment of the Liquidator or otherwise.

[23] The Application before the Court is not procedural but is for a final order to remove the Liquidator which has significant implications for the reputation of the Liquidator. In my view, the Deponent has failed to comply with the requirements of CPR 30.3.

¹⁴ Paragraph 17 of the principal affidavit

At best the information contained in the principal affidavit and supplemental affidavits are allegations and is not in this Court's view evidence in support of the Application.

[24] Further, the Liquidator has even refuted the aforesaid allegations made by the Deponent. The Liquidator has stated that upon appointment he commenced control of the Company in October 2009. He corresponded with Mr. George Worme, the then Managing Director of the Company on the 2nd November 2009 seeking all relevant information. He examined the Statement of Affairs delivered to him on or about the 27th November 2009 by Mr. Worme, in accordance with section 389 of the Companies Act¹⁵.

[25] The Liquidator has also stated that he conducted further investigations in respect of the assets of the Company in November 2009 by interviewing former employees such as Ms. Jose Joseph, an Administrative Assistant at the Company. He requested specific information relating to the affairs of the Company. He examined statements relating to the Company's National Insurance payments and liabilities. He attended Court and applied for and obtained orders made on 11th December 2009 that Mr. Worme deliver to the Liquidator a Statement of Affairs and list of all assets held by the Company within 10 days. He attended Court and applied for and obtained a further Order vesting all or any property, real or otherwise of the Company in his possession. He published a report giving notice to the Creditors of the Company, including the Petitioner, of the cash of the Company and identifying the liabilities of the Company as at 21st December 2009. He also caused witness summonses to be issued summoning certain former staff members to Court for them to be examined under section 420 of the Companies Act.¹⁶

[26] He stated that the only time he has failed to attend Court was when neither he nor his attorney was notified by the Supreme Court Registry of the hearing of the 18th September 2013¹⁷. He denies appointing Mrs. Francis-Banfield as his legal

¹⁵ Paragraph 8 of the Liquidator's principal affidavit

¹⁶ Paragraph 8 of the Liquidator's principal affidavit.

¹⁷ Paragraph 14 of the Liquidator's principal affidavit.

representative in this matter and that he changed his business address¹⁸. He states that his address was and remains True Blue, St. George's, Grenada¹⁹.

[27] According to Court's records, Mrs. Francis- Banfield's notice filed on 23rd April 2013 states that she replaced Justis Chambers, who were the attorneys on record for the Liquidator, yet at the hearing of the witness summons on 18th September, 2013 she announced that she was appearing for the Petitioner, although she was the attorney who issued the witness summons filed on the 23rd April, 2013, as Counsel for the Liquidator. As such the affidavits of service for the said witness summonses were for the persons who were summoned to attend Court and quite reasonably there was no evidence of the Registry notifying the Liquidator since according to the Court's records Mrs. Francis-Banfield was the attorney on record for the Liquidator. In light of this confusion, I accept the Liquidator's reasons for his failure to attend Court on the 18th September 2013 and I do not find that this is an act which demonstrates a lack of interest on his part.

[28] The Liquidator has denied any delay on his part. He stated that between October 2009 and July 2011 he was conducting interviews and compiling information on the status of the assets and liabilities of the Company²⁰. He states that on 20th January 2012 he attended Court with respect to an application to have the Court examine certain parties under oath, and it was only in March 2012 upon receipt of the perfected order he was able to issue the summons for persons to attend Court to be examined. He stated that the persons, who have been summoned although not examined as yet, are aware of their obligations to return to Court.

[29] In light of the Liquidator's evidence, the allegations made by the Deponent in the principal affidavit and supplemental affidavit have been refuted by the Liquidator and are baseless. I therefore agree with the Liquidator that the Deponent has failed to adduce evidence to establish that she has a legitimate interest in the relief

¹⁸ Paragraph 14 of the Liquidator's principal affidavit.

¹⁹ Paragraph 15 of the Liquidator's principal affidavit.

²⁰ Paragraph 10 of the Liquidator's principal affidavit

sought and as such I find that she has no locus standi in seeking the reliefs in the Application.

- [30] Having determined the first issue, this effectively disposes of the Application. However, the Liquidator is effectively an officer of the Court since he was appointed by the Court. In this regard the Court's inherent jurisdiction to control the conduct of its own officers is beyond dispute²¹. It is because of this residual overall responsibility I will address the other issues made in the Application.

Has the Deponent shown due cause?

- [31] To determine whether an applicant has demonstrated "due cause", Thomas J in **Alexander M. Fundora v Nigel Hamilton-Smith and Anor** ²² conducted a full examination of the merits of the grounds upon which the applicant sought to remove the Liquidator. In that case, based on the evidence before the Court, the learned Judge considered the destruction of evidence/mishandling of computer data, rent, liquidators acting outside their remit and disregard for the Canadian jurisdiction including disregard of regulatory bodies.
- [32] However, there is no evidence in support of the Application upon which the Court can seek to investigate in order to remove the Liquidator since the Deponent has presented unsubstantiated allegations.
- [33] In the circumstances, it is my view that the Deponent has failed to show due cause.

Should the Liquidator be removed?

²¹ Lord Millet at Paragraph 23 in Deloitte & Touche AG v Christopher D. Johnson and Anor (Cayman Islands) [1999] UKPC 25

²² ANUHCv2009/0149

[34] In **Alexander M. Fundora v Nigel Hamilton-Smith and Anor**²³ Thomas J summarized the circumstances where the Court exercised its discretion to remove a liquidator for due cause. He stated:

“It is common ground or settled law that a Liquidator may be removed by the Court as authorized by statute. And the jurisprudence established other principles including the following: removal for due cause (the operation test) is measured by reference to the real substantial, honest interest of the liquidation and the purpose for which the liquidation is appointed²⁴, in the context of removal, it is not necessary for the applicant to show that the Liquidator has failed to act in an efficient, vigorous and unbiased manner and was likely to continue to do so in the future²⁵, it is not necessary to show misconduct or unfitness,²⁶ it is not necessary to prove anything in sight, it is not necessary to prove misfeasance as such or that there may well be a case of misfeasance²⁷ a Liquidator may be removed if in all the circumstances it is desirable to do so, and the Court should not lightly remove its own officer and may pay due regard to the impact of such removal on his professional standing and reputation”.²⁸

[35] The difficult balancing exercise which the Court is required to conduct in deciding whether to remove a liquidator was described by Neuberger J in **AMP Music Box Enterprises Ltd** as:

“On the one hand the Court expects any liquidator, whether in a compulsory winding up or a voluntary winding up, to be efficient and vigorous and unbiased in his conduct of the liquidation, and it should have no hesitation in removing a liquidator if satisfied that he has failed to live up to those standards at least unless it can be reasonably confident that he will live up to those requirements in the future.²⁹

[36] Neuberger J continued:

“On the other hand, if a liquidator has generally been efficient and honest, the Court must think carefully before deciding to remove and replace him³⁰.... Further, the Court has to bear in mind that in almost any case where it orders a liquidator to stand down, and replaces him with another liquidator, there will be undesirable consequences in terms of costs and in terms of delay³¹”.

[37] Neuberger J also acknowledged the duty of the Court in appropriate cases:

²³ Supra

²⁴ See :Re Adam Eyton Limited (1887) 36 Ch. D. 299

²⁵ See :Re Buildhead (No 2) [2004] (No. 2) EWHC 2443

²⁶ See: Keyapak Homecare Ltd(1987) 3BCC 558

²⁷ See: Re Shepheard v Lamey[2001] BPIR 939

²⁸ ANUHCv2009/0149 at para 212

²⁹ [2002]BCC 996 at page 1001

³⁰ Ibid

³¹ Ibid

“To make such an order, not merely on the merits of the particular case but also because it sends out a clear message to liquidators that they have an important function which they should conduct in a vigorous, effective and independent manner”³².

[38] In **Keypak Homecare Ltd**, the Liquidator had only been in office for three months at the time of the application to remove him. During that time he had sold the company's remaining stock to a new company for little more than its forced-sale and had sold cars. The creditors sought to replace him on the ground that he was not pursuing the liquidation with vigour. While the Court noted that the Liquidator had over 20 years' experience in liquidation and had acted as a liquidator in over 600 cases, it removed the Liquidator and appointed another. The Court was of the view that the Liquidator had made no examination of the sales and purchase ledgers, conducted no investigation to ascertain whether stock was missing and if so, what had happened to it. He made no enquiry of the new company, he had not taken evidence or interviewed any of the employees of the business (Keypak) who might have told him what was going on in the week before Keypak ceased trading and he made no attempt to see whether he could obtain a better price selling stock back to those who supplied it. In the Court's view his lack of action to do these things demonstrated lack of vigour on his part.

[39] In **AMP Music Box Enterprises Ltd**, a creditor applied to remove a liquidator of a company and appoint a new liquidator on the grounds that the company's affairs should be properly investigated by a truly independent liquidator. The Court dismissed the application for two reasons. Firstly it was of the view that there was no evidence to support the contention of bias of the Liquidator. Secondly, the evidence in support of the alleged lack of vigour did not justify the removal of the Liquidator. The Court found that it was not a case where the Liquidator had done nothing. On the evidence, the Liquidator had done quite a lot. The Court was of the view that there were criticisms that the Liquidator should have been more active in seeking or finding financial creditors to investigate and pursue certain aspects of investigation but it did not have a great deal of time to do so. In this

³² Ibid

case the Court balanced the nature of the allegations against the Liquidator with the effect of the disruption, necessity and expense of removing the Liquidator.

[40] In **Re Lowestoft Traffic Service Company Limited**³³ the Court removed a liquidator who could not be seen as independent. In **Re Gordon & Breach Science Publisher Ltd**³⁴ a liquidator was removed where the circumstances were such that through no fault of his own, he was perceived to be, even though he may not be, biased in favour of one or more creditors.

[41] The Courts have removed a liquidator in circumstances where they were satisfied from the evidence that the Liquidator has been either inefficient, lacked vigour or was biased in the discharge of his duties. The evidence presented is therefore critical in making such a finding.

[42] In light of the Liquidator's evidence which has been already set out aforesaid, I find that this is not a case where the Liquidator has done virtually nothing as in **Keypak**. In my view the Liquidator has not been unprofessional, biased or dishonest. There has also been no evidence to satisfy me of misconduct or wrongdoing on the part of the Liquidator, and he has not adopted a relaxed or complacent attitude in pursuing the liquidation. In hindsight there may be some criticisms which may be levelled against him such as the contents of his reports, but when one looks at the totality of the evidence it would be unfair to the Liquidator and unnecessary, expensive and disruptive to remove the Liquidator. I can find no reason to remove him for due cause.

Order

[43] The Application is dismissed. The Petitioner to pay the Liquidator the costs of the Application assessed in the sum of EC \$2,000.00.

Margaret Y. Mohammed

³³ (1986) 2 BCC 9

³⁴ [1995] BCC 261

High Court Judge