

GRENADA

**IN THE SUPREME COURT OF GRENADA
AND THE WEST INDIES ASSOCIATED STATES
HIGH COURT OF JUSTICE
(CIVIL)**

CLAIM NO: GDAHCV 2001/0652

BETWEEN:

**PATRICK THOMAS
PATSY THOMAS
BERNICE BRYCE
MARISKA THOMAS
WINSTON THOMAS
BEVIN THOMAS
KNEARLYN THOMAS
MIRIUM HARRYMAN
VILMA THOMAS**

Petitioners

and

**THOMAS REAL ESTATE COMPANY LTD
DENZIL THOMAS
EARLYNE THOMAS
DENIS THOMAS**

Respondents

and

CLAIM NO. GDAHCV 2001/0653

BETWEEN:

**PATRICK THOMAS
PATSY THOMAS
BERNICE BRYCE
MARISKA THOMAS
WINSTON THOMAS
BEVIN THOMAS
KNEARLYN THOMAS
MIRIUM HARRYMAN
VILMA THOMAS**

Petitioners

and

**CROCHU BEACH RESORTS LIMITED
DENZIL THOMAS
EARLYNE THOMAS
DENIS THOMAS**

Respondents

Appearances:

Ms. Cindy John of Grant, Joseph & Co. for the Claimants
Ms. Gennilyn Ettienne and Ms. Claudette Joseph for the second Defendant
Ms. Denise Campbell for the 4th Defendant
Mr. L. Haynes instructed by Henry, Henry & Bristol for the Liquidator

2011: July 1

DECISION

- [1] **HENRY, J.:** The claimants and the second, third and fourth defendants are all children of LCJ Thomas. LCJ Thomas held shares in both Thomas Real Estate Limited and Crochu Beach Resorts Limited. Following Mr. Thomas' death Alleyne, J. ordered that the shares held by Mr. Thomas be distributed to the beneficiaries of his estate with each beneficiary to receive 1/16 share.
- [2] By order of the Court dated 29th May 2003 and entered 19th January 2004, Brian Robinson of PriceWaterHouseCoopers was appointed liquidator of both Thomas Real Estate Limited and Crochu Beach Resorts Limited. The order specified that the appointment was made with all the powers and duties of a Liquidator as contained in the Companies Act No. 35 of 1994 of the Laws of Grenada or any other legislation related thereto as well as with further duties and responsibilities conferred by the order.
- [3] By application filed 11th December 2008 with supporting affidavit, the 4th defendant seeks the removal of the liquidator. By summons dated 6th March 2009 together with supporting affidavit filed 9th March 2009, the second and third defendants also seek the removal of the Liquidator in respect of both companies. Further affidavits in support of the application were filed by 3rd Defendant.
- [4] The liquidator has filed three affidavits dated December 15th 2008, December 17, 2008 and 9th March 2009 in which he opposes the applications for his removal.

- [5] At the hearing of the applications on 20th January 2011, the 4th Defendant was granted leave to withdraw his application. There remains before the court therefore, the application of the 2nd and 3rd defendants for removal.
- [6] The 2nd and 3rd defendants assert two basic grounds for their application: (a) the delay in the Liquidator's performance of his duties resulting in prejudice to them and (b) the Liquidator's non-compliance with the provisions of the Companies Act and certain specific mandatory provisions of the court's order entered 19th January 2004.
- [7] Specifically the applicants allege that after 5 years the Liquidator has not yet completely identified and placed under his control all the real property of the companies as required by paragraph 2 of the court's order. Further, that the liquidator has failed to diligently take action to recover certain parcels of the property from squatters. This delay, they assert, has increased the ability of the squatters on the property to plead limitation/adverse possession. All of which they claim have severely prejudiced them as shareholders and contributories of the companies since the majority of the assets comprise real property.
- [8] With regard to the distribution of the shares of the companies in accordance with the court's order, they assert that it is inconceivable for the Liquidator to assert that it has taken him over four years to determine and give effect to the shareholding of the companies.
- [9] With regard to the cash assets of the company, the second defendant alleges that he has not seen any accounting reports showing interest payment received for funds held on deposit by the liquidator; that the liquidator has refused to advise what his fees could be and has not capped the amount of fees he can charge; he has also failed to advise the shareholders on an annual basis of the cost of the liquidation and has failed to produce audited accounts or an indication of future costs and expenses. The applicant fears that if the liquidation is allowed to continue all monies and assets of the company will be squandered to the detriment of the shareholders. Removal, he asserts, will reduce the cost of the liquidation.
- [10] In regard to the alleged non-compliance with the court's order, the applicants allege that there has been an unexplainable and egregious breach of the reporting provision of the court's order. This, the applicants contend is, in and of itself, sufficient ground for the court to remove the Liquidator.

- [11] The applicants refer the court to the case of **Re Keypack Homecare Ltd.** [1987] Ch. D 409, where Millet J. held that a court will remove a liquidator where the liquidator has failed to display sufficient vigour in carrying out his duties as Liquidator. They submit that the case at bar reveals such a Liquidator who has failed to carry out his duties in a timely manner, breaching the very terms of his appointment. The applicants therefore ask that the court exercise its discretion and order the removal of the liquidator.

The Law

- [12] The Companies Act, No. 35 of 1994 of the Laws of Grenada provide at Section 395(1) that "A liquidator appointed by the court may resign or, on cause shown be removed by the court."
- [13] The approach to be taken by a court in resolving an application for removal of a liquidator has been dealt with by Mathew, J. in the case of **Nan Tai Electronics Inc. v Haque** [2001] ECSJ No 184. Quoting from the case of **Johnson and Dinnan v Deloitte Touche A.G.** 1997 Cayman Islands Law Reports, he states:
- "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) Has due cause been shown and (c) If such cause has been shown, should the court exercise its discretion and remove the Liquidator?"
- [14] The Court **In the Matter of Bank of Crozier Limited** No. GDAHCV 2003/0255 in coming to a determination as to whether there was due cause to remove the liquidator applied the test in **Re Edenote Ltd; Tottenham Hotspur plc & Ors v Ryam & anr** [1996] NLOR No 3497 where it was stated that the court would only interfere with the act of a liquidator if he had done something so utterly unreasonable and absurd that no reasonable man would have done it.

Locus Standi

- [15] It is accepted that the applicants as beneficiaries and contributories of both companies have standing to make the application. They have therefore successfully passed the first hurdle.

The issue of Due Cause

- [16] As set out in his affidavits, the Liquidator's position is that the main issue which has affected the progress of the liquidation is the identification of the assets owned by Thomas Real Estate Company. He states that he had few books and records of the company and no original title

deeds. Therefore everything had to be researched and then verified. Eventually, he was able to build a database of the various transactions and identified an approximate acreage which needed to be confirmed by a survey. However, the Liquidator expresses that he had great difficulty in securing the services of a surveyor who kept to the projected start dates. Despite the fact that one of the beneficiaries is a surveyor, the Liquidator says that decided to engage a surveyor who was independent and that took some time to accomplish. He stresses that the delays experienced in respect of the liquidation have been beyond his control and vigorously deny the allegation that he has needlessly protracted the liquidation.

- [17] In regard to the presence of squatters on the land, the Liquidator admits that he was advised of their presence but was advised by his attorneys that he should await the results of the survey before taking action to remove them. He points out that the squatting was said to have commenced in or around 2004, so that there was no immediate danger or threat to ownership.
- [18] The Liquidator denies that he failed to identify the shareholders or contributories in a timely manner or have refused to register them. He asserts that his efforts in this respect have been constant and careful.
- [19] With regards to his fees, the Liquidator refers to the Court's order of January 19th 2004 which provides the terms of his remuneration. He therefore asserts that his fees are in all respects reasonable given the complexity of the liquidation.
- [20] The liquidator acknowledges his failure to comply with the Court's order in respect of the time frame for submission of reports. He states that he had taken a decision to defer the filing of the report given that there were no payments issued and there had been little progress in the liquidation process and given the cost factor. He states that he now realises that he should have filed a report at the appointed time, no matter how short such a report might have been or alternatively applied to the court to vary the order of January 19th 2004 in respect of the time frame. He apologises to the Court and to the beneficiaries and undertakes to comply with the time frame set out in the said order of the Court in the future.

- [21] He points out that reports have since been filed in which he has provided an account of receipts and disbursements. He denies that he has needlessly protracted the liquidation and if allowed to continue will do so for another 5 years. He therefore asks the Court to deny the application.
- [22] The majority of the claimants also oppose the application to remove the Liquidator. By affidavit filed on 26th December 2008, the first claimant on behalf of himself, the second, fourth, sixth, seventh and eight claimants indicated that they are not satisfied that valid grounds exist for the removal of the Liquidator. Although they admitted that the liquidation process had been slow, they opined that even if the liquidator was removed and a new one appointed it would cause further delay and additional costs in the matter. They therefore submit that this is not a case for the removal of the liquidator.
- [23] Paragraph 14 of the court's order filed January 19th 2004 required the liquidator to provide a report within 60 days of his appointment and thereafter to file reports no less frequently than six months from the date of his last report. In addition, section 402 of the Companies Act provides that every Liquidator shall, not less than twice each year during his tenure, send to the Registrar an account of his receipts and payments as liquidator.
- [24] The liquidator admits that he has failed to file his reports in accordance with the above time frame. At the time of the making of the application only two reports had been filed. However by the time of the hearing of the application on 20th January 2011, four reports had been filed. The first report was filed on 19th October 2005, the second on 26th November 2008, the third on 12th June 2009 and the fourth on 18th October 2010. Annexed to each report is an account of his receipts and payments.
- [25] The applicants make the point that the first report was filed approximately one year and ten months after it should have been filed and the second some four years late. This puts the breach in stark perspective. However the time periods cannot be viewed in isolation. The Court must look at the surrounding circumstances and events which may have occurred as well as the impact on the overall liquidation.
- [26] The liquidator highlights the paucity of records and documents he had to work with and the extreme difficulty in conducting searches during the aftermath of hurricane Ivan. While the Court

does not believe that this amounts to an excuse for the failure to file for such an extended period, the Court notes that since the making of the application and in accordance with the liquidator's undertaking in his affidavit, two additional reports were filed. The contents of the reports themselves provide support for the view that while delays have occurred which have slowed the progress of the liquidation, progress has indeed been made.

- [27] One of the major complaints of the applicants has been the failure of the liquidator to properly identify and take control of the assets of the company. Thomas Real Estate Company was a holding company engaged in the purchase and sale of land throughout Grenada. The Reports highlight the difficulties of identifying all the land held by the company without proper documentation. The long awaited survey by Lett and Partners was conducted between February and December 2009. It identified 40.59 acres as owned by the company. The searches previously done had estimated the company owned 56.53 acres and the survey done by Denis Thomas, one of the defendants, had identified 45.87 acres. So that additional work needs to be done in order to determine definitively the extent of the real estate holdings of the company.
- [28] Furthermore, the report revealed that of the lands identified by the Lett survey, none had squatters living thereon. It remains to be seen whether any will be revealed when the final determination is made. It underscores that the decision of the liquidator to await the survey report before moving against the alleged squatters was a prudent course, especially in light of the fact that if their occupancy commenced in 2004, then there is no immediate danger of acquired ownership by adverse possession.
- [29] With regard to the finalisation of the shareholders, here too there have been delays. However, on 19th December 2009, the Court gave leave to the Liquidator to advertise for shareholders of Thomas Real Estate to identify themselves and to provide proof of their shareholding. That has been done. The Court anticipates that resolution of this issue should be almost immediate.
- [30] With regard to the allegations of the second defendant as to the Liquidator's alleged refusal to hold shareholder meetings and failure to establish a committee of inspection, I am of the view that the Liquidator is not in breach of the Companies Act or the order of the Court in this regard.

[31] With regard to the alleged failure of the Liquidator to file audited accounts, the provisions of section 402 of the Companies Act mandate that the Liquidator file an account of his receipts and payments at least twice per year during his tenure. However, pursuant to sub-section (3), it is the Registrar who is to cause the accounts to be audited by an auditor eligible for appointment as an auditor pursuant to section 158. To each report that has been filed by the Liquidator, there has been an account of his receipts and payments. However, the Court notes that the accounts ought to be verified by an affidavit or a statutory declaration, which has not been done.

[32] Furthermore, I find the concerns expressed that if the Liquidator is allowed to continue and be paid fees and expenses, all the money and assets of the company will be squandered to the detriment of the shareholders without merit. The order of the Master entered on 19th January 2004 makes provision for the remuneration of the Liquidator. Pursuant to that order, the account of the Liquidator shall be taxed prior to his discharge, in any event. There is no need, at this stage, for the Court to make any further provision.

[33] Section 405 of the Companies Act provides:

“(1) When a winding-up order has been made by the court, it shall be the business of the separate meetings of creditor and contributories summoned to determine . . . whether or not an application is to be made to the court for the appointment of a committee of inspection to act with the liquidator and who are to be members of the committee if appointed.”

[34] The second defendant alleges that the Liquidator has failed to establish a committee of inspection and asks the Court to appoint such a committee. Firstly, it is not the duty of the Liquidator to establish such a committee. Secondly, the request contained in the affidavit of the second defendant that the Court appoints such a committee is not in compliance with the requirements of section 405.

CONCLUSION

[35] Applying the test laid down in *Re Edonnote*, it cannot be said that the acts of the Liquidator are so utterly unreasonable and absurd that no reasonable man would have done so.

[36] While the applicants have demonstrated that there have been delays and also a failure on the part of the Liquidator to adhere to the time frame for submission of his reports, in all the circumstances

of this case, I am of the view that the applicants have not discharged their onus of proof and that no sufficient cause has been shown which requires the removal of the Liquidator, for the following reasons:

1. Despite the delays in ascertaining the assets of the companies and distribution of the shares, significant progress has been made and the issues are near resolution. There has been no loss of company stock or property as a result of the actions or inaction of the Liquidator. The facts in this case therefore, can be distinguished from those in *Re Keypack Homecare Ltd*.
2. The majority of the beneficiaries and contributories have not lost confidence in the Liquidator and are not in favour of his removal;
3. More time would be spent and cost incurred if another Liquidator is appointed to complete the liquidation at this stage. It is therefore not to the general advantage of the persons interested that removal of the Liquidator be ordered. The current Liquidator ought therefore to proceed with all deliberate urgency.

[37] While the Court has determined not to remove the liquidator at this stage of the liquidation, this is not an endorsement of the slow pace or the failure of the liquidator to adhere to the required time frame for reports. The Liquidator is hereby placed on notice that in the future the court expects strict compliance with the order of the court and any time frames therein, unless application to vary is made.

[38] With regard to the accounts of receipts and payments already filed, the Liquidator is directed to re-file same with the appropriate verification as mandated by section 402 (2) of the Companies Act within 7 days.

[39] Accordingly, the application by the second and third defendants for an order for the removal of Brian Robinson as Liquidator of Thomas Real Estate Company Limited and Crochu Beach Resort Limited is denied. The further request for orders contained in paragraph 18 of the supplemental affidavit of the second defendant is also denied.

[40] Parties to agree cost within 14 days, in default submissions to be filed within 7 days thereafter.


Clare Henry
HIGH COURT JUDGE