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 Mrs. Courtney Pearce-Hanna and Ms. Syneisha Bootle of Callenders & Co. for Dupuch & Turnquest
Mr. Sean Moree of McKinney Bancroft & Hughes for the Joint Official Liquidators
Present also is Mrs. Beatrice Miranda, registered associate, McKinney Bancroft & Hughes and Mrs. Maria Ferere

Hearing Dates: 7 February 2019, 21 August 2019, 18 October 2019, 16 February 2021

Company – Winding Up – Professional fees – Whether fees and expenses of Counsel to the Liquidation Committee should be paid out of the assets of the company as an expense of the liquidation – Whether Counsel to the Liquidation Committee was properly engaged and acted in the interest of all the creditors – Order 9 rule 5 of Companies Liquidation Rules, 2012 – Order 25 rule 4 of Companies Liquidation Rules, 2012

Preliminary Objection – Whether the Consent Order created an estoppel – Nature and effect of Recitals in a Court Order

Taxation of costs – whether fees and expenses were reasonably and properly incurred – costs on an indemnity basis

The Joint Official Liquidators ("the Liquidators") of Rural International Bank Limited (In Liquidation) ("RIBL") seek the direction of the Court on whether the three invoices submitted by Dupuch & Turnquest ("D&T") as Counsel to the Liquidation Committee should be paid out of the assets of RIBL as an expense of the liquidation.

The Liquidators query whether the legal fees and expenses of D&T were reasonably and properly incurred on behalf of the general body of creditors of RIBL or whether they were incurred solely on behalf of Banco de Fomento Internacional, S.A. (the largest admitted creditor of RIBL) ("BFI") and/or its agents.

The Liquidators assert that D&T was not properly engaged by the Liquidation Committee ("the Committee") from the outset and that for all intents and purposes D&T acted on behalf of BFI alone and received instructions exclusively from the representatives of BFI. In this regard, the Liquidators say that RIBL should not be liable to settle the invoices.

D&T in raising a preliminary objection asserts that the Consent Order filed on the 17 January 2019 ("Consent Order") operates as an estoppel to the Liquidators' extant applications regarding liability. Additionally, D&T further assert that by the inclusion of the last Recital and paragraph 7 in the Consent Order the Liquidators effectively abandoned the issue of liability to pay the invoices.

HELD: D&T were properly appointed as Counsel to the Liquidation Committee. The fees and expenses of D&T between 21 March 2017 and 19 February 2018 were reasonably and properly incurred (except for the items mentioned herein) and are payable out of the assets of RIBL.

1. Regarding the preliminary objection:

    (i) The Consent Order does not operate as an estoppel barring the Liquidators from seeking the direction 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 (**Noor v UKBA** (2012) UKEAT/0546/11 considered); and

    (ii) Recitals are non-operative terms that assist with the background and interpretation of an order or a document. They are unenforceable. See **X v T (Permission to Appeal)** [2019] EWHC 1713 (Fam); To the extent that a Recital conflicts with the operative provision, the operative provision prevails: **Franklins Pty Ltd v Metcash Trading Ltd** [2009] NSWCA 407.

2. Although the engagement letter was not signed by all of the members of the Liquidation Committee, D&T was nonetheless duly appointed as counsel by a valid resolution of the Committee on the 21 March 2017 in accordance with Order 9 rule 5 of the Companies Liquidation Rules, 2012. Unlike the official liquidator's legal counsel, there is no mandatory requirement of an engagement letter for counsel to the liquidation committee: Order 25 rule 1 of the Companies Liquidation Rules, 2012 considered.

3. In accordance with paragraph 5 of the Order of the Court filed on the 21 February 2018 D&T ought not to have continued work or act on instructions until after the election of the two additional members of the Committee.

4. All fees and expenses incurred by D&T from 21 March 2017 to 19 February 2018 were reasonable and proper (except for the items mentioned herein which are disallowed) and as such ought to be paid out of the assets of RIBL as an expense of the liquidation: Order 25 of the Companies Liquidation Rules, 2012 considered.

RULING

Charles J:

Introduction

[1] The Joint Official Liquidators ("the Liquidators") of Rural International Bank Limited (In Liquidation) ("RIBL") filed three applications seeking directions from the Court on whether any part of the fees and expenses set out in the three invoices submitted by Dupuch & Turnquest ("D&T") in the aggregate amount of B$653,741.39 should be paid out of the assets of RIBL as an expense of the liquidation ("the Liquidators' Summonses").

[2] For the reasons which will become evident later on in the Ruling, I find the preliminary objections raised by Counsel for D&T are unsustainable. I also find that D&T were properly engaged by the Liquidation Committee ("the Committee") and that the Liquidators are only obligated to settle the first two invoices of D&T out of the estate of RIBL in so far as the work done and fees incurred were between 21 March 2017 to 19 February 2018. The specific items in the two invoices referred to below are disallowed.

Background and procedural history

[3] RIBL was incorporated under the laws of the Commonwealth of The Bahamas on 20 December 1995 and was duly licensed on 19 January 1996 to carry on banking business in The Bahamas.

[4] RIBL is a wholly-owned subsidiary of Banco Rural S.A., a Brazilian bank which was placed into extra-judicial liquidation on 2 August 2013 by a decree of the Central Bank of Brazil.

[5] On 1 November 2013, the Central Bank of The Bahamas filed a Petition in this Court seeking an order for the winding-up of RIBL and for the appointment of

provisional liquidators. On 8 November 2013, Alison J. Treco ("Ms. Treco") and Maria M. Ferere ("Mrs. Ferere") were appointed Provisional Liquidators of RIBL.

[6] On 6 January 2014, RIBL was placed into compulsory liquidation by this Court and Ms. Treco and Mrs. Ferere were appointed the Liquidators of RIBL.

[7] On 20 March 2014, the following creditors were appointed to the Committee of RIBL: Banco de Fomento Internacional, S.A ("BFI"), (represented by Luis Patricio Rodrigues; Agostinho Rocha (represented by Jose Francisco Sara Ivo de Refois Braz da Silva); and Joao Fernando Soares Pinto (represented by his daughter, Danielle A S Pinto).

[8] On 21 March 2017, a resolution was passed and subsequently ratified and confirmed by the Committee appointing D&T as its legal counsel.

[9] By Order dated 19 February 2018 and filed on 21 February 2018 ("the February 2018 Order") this Court decided and ordered, *inter alia*, the following:

> **"(a) ……**
>
> **(b) BFI – Banco de Fomento Internacional, S.A. ("BFI") and Luis P. Rodrigues ("Mr. Rodrigues") in their capacity as a member of the Committee and its representative respectfully have conflicts of interest arising from their commercial/private relationship with Geofinance Limited ("Geofinance"), Key Financial Investment Group LLC ("Key Financial") and Monique Merriam ("Mrs. Merriam") prior to the commencement of the RIBL liquidation (the "Conflicts of Interest");**
>
> **(c) Having regard to the conflicts of interest, the Liquidators acted properly in not providing additional information to BFI and Mr. Rodrigues with regard to (i) the court action commenced by RIBL in the United States District Court for the Southern District of Florida against, *inter alia*, Geofinance and Key Financial including the enforcement of the judgment obtained by RIBL against those companies; and/or (ii) any attempts to recover funds or assets from Mrs. Merriam and/or Bruno Junqueira, including any court action to be commenced by RIBL against those persons ("the Restricted Information");**
>
> **(d) ….**

IT IS HEREBY ORDERED THAT:

1. ……

2. ……

3. <u>The Liquidators shall convene a meeting of the creditors of RIBL for the purpose of electing two (2) additional persons to be members of the Committee (the "Creditors' Meeting")</u>. (Emphasis added)

4. On the basis of the conflicts of interest, BFI and any creditor who is represented at the Creditors' Meeting by a person (i) who is employed by BFI; (ii) who is an officer, director, consultant or agent of BFI; or (iii) who receives remuneration from BFI in connection with providing services to BFI (individually a "Connected Party") shall not be allowed to vote at the Creditors' Meeting on the election of two (2) additional members of the Committee.

5. <u>All further instructions to Counsel for the Committee and matters relating to their engagement shall be deferred until after the election of the two additional members of the Committee under paragraph 3 above.</u> (Emphasis added)

6. The Liquidators be and are hereby authorized to withhold the Restricted Information from BFI and any other member of the Committee who is represented at meetings of the Committee by a Connected Party, and such parties shall not be allowed to vote at meetings of the Committee on any matters relating to or arising from the Restricted Information….."

[10] On 6 March 2018, D&T attempted to appeal the February 2018 Order to the Court of Appeal without seeking or obtaining the requisite leave or further direction of this Court.

[11] On 17 April 2018, D&T filed (i) a Summons in the Court of Appeal seeking an extension of time to appeal the February 2018 Order and (ii) a Summons in the Supreme Court seeking a stay of execution of the February 2018 Order pending the hearing of the appeal.

[12] On 25 May 2018, D&T filed a Summons in the Supreme Court seeking leave to appeal the February 2018 Order.

[13] <u>On 28 May 2018 the newly constituted five member Liquidation Committee passed a resolution terminating D&T</u>.

[14] By a letter from the firm of McKinney Bancroft & Hughes dated 29 May 2018, Mrs. Ruby Gray of D&T was informed, *inter alia,* that at the meeting of RIBL's Liquidation Committee held on 28 May 2018, a resolution was passed to terminate the engagement of D&T as Counsel with immediate effect.

[15] On 14 January 2019, the appeal to the Court of Appeal was withdrawn and dismissed.

[16] An Order by consent of the parties was filed on 17 January 2019 ("the Consent Order"). The portions of the Consent Order that are material to the issues before me are as follows:

> **"AND WHEREAS, in addition to the invoices which are the subject matter of the First Summons and the Third Summons respectively (the "Two Invoices"), D&T intends to deliver to the Liquidators further invoices in respect of legal services rendered to the Committee since February 2018 (the "Additional Invoices").**
>
> **AND WHEREAS D&T and MBH will seek to agree the amount to be paid to D&T in respect of the Two Invoices and the Additional Invoices (together the "D&T Invoices"), without prejudice to the right of the Liquidators to object to the payment of any amount in respect of the Additional Invoices.**
>
> **1. …**
> **2. …**
> **3. The hearing of the First Summons and the Third Summons be and is hereby adjourned to 11:00 a.m. on 7 February 2019. (Emphasis added)**
> **4. …**
> **5. …**
> **6. …**
> **7. In the event that the parties are unable to agree the aggregate amount payable in respect of the D&T Invoices by 31 January, 2019, then such amount is to be fixed by the Court at the adjourned hearing on 7 February 2019 at 11:00 a.m." [Emphasis added]**

The Liquidators' Summonses

[17] The First Summons filed on 21 February 2018 seeks (i) directions on whether, in all the circumstances outlined in the Affidavit of Alison J. Treco filed on 16 March 2018 in support of this application ("the Treco Affidavit"), the fees and expenses

set out in the invoice of D&T dated 6 October 2017 as counsel to the Liquidation Committee in the amount of B$87,093.55 ("the First Invoice") or any part thereof should be paid out of the assets of RIBL as an expense of the liquidation; (ii) in the event that the Court directs that the First Invoice should be paid out of the assets of RIBL, an order that the fees and expenses set out therein be taxed under Order 9, rule 5(4) of the Companies Liquidation Rules, 2012 ("the Rules"); (iii) directions on the future course of the engagement of D&T by the Committee and on the persons authorized to provide instructions in respect of such engagement; and (iv) an order that the costs of RIBL in respect of the First Summons be costs in the liquidation.

[18] The Second Summons filed on 2 May 2018 seeks (i) directions on whether, in all the circumstances outlined in the Treco Affidavit and in the Affidavit of Maria M. Ferere filed on 24 May 2018 in support of the Second Summons ("the Ferere Affidavit"), the fees and expenses set out in the second invoice of D&T dated 9 March 2018 as counsel to the Liquidation Committee in the amount of B$252,285.66 ("the Second Invoice") or any part thereof should be paid out of the assets of RIBL as an expense of the liquidation; (ii) in the event that the Court directs that the Second Invoice should be paid out of the assets of RIBL, an Order that the fees and expenses set out therein be taxed under Order 9, rule 5(4) of the Companies Liquidation Rules, 2012 based on the directions given under this Summons; and (iii) an order that the costs of RIBL in respect of the Summons be costs in the liquidation.

[19] The Third Summons filed on 7 February 2019 seeks (i) directions on whether any part of the fees and expenses set out in the Third Invoice of D&T dated 31 January 2019 in the amount of $314,362.18 ("the Third Invoice") should be paid out of the assets of RIBL as an expense of the liquidation; and (ii) an Order that the costs of RIBL in respect of this application be costs in the liquidation.

[20] The key issue emanating from the Liquidators' Summonses is whether the fees and expenses (or any part thereof) set out in the three D&T invoices should be

paid out of the estate of RIBL as an expense of the liquidation ("the Liability Issue"). The Liquidators' 21 August 2019 application concerned their request to have liability decided first and quantum decided later.

Preliminary objections

[21] Learned Counsel for D&T, Mrs. Morgan-Gomez raised the following preliminary objections:

(i) The Consent Order created an estoppel precluding the Liquidators from proceeding with their extant applications on the issue of liability to pay the D&T invoices ("the Estoppel Issue"); and

(ii) The last Recital and operative paragraph 7 in the Consent Order indicates/confirms that the Liquidators have abandoned the issue of liability to pay the D&T invoices ("the Recital Issue").

The parties' contentions

[22] In addressing the points raised in her preliminary objection, Mrs. Morgan-Gomez argued that, as a consequence of the Consent Order, the Liquidators are estopped from raising the issue of liability in connection with the D&T invoices. Additionally, she submitted that paragraph 7 of the Consent Order supports the position that the issue of liability has been subsumed by the agreed directive that the Court is to now decide the amount/quantum owing to D&T.

[23] Mrs. Morgan-Gomez further argued that, by the Liquidators agreeing to include the last Recital and the operative paragraph 7 in the Consent Order, they in effect abandoned their primary contention as outlined in the Liquidators Summonses that no part of the D&T invoices should be paid out of the estate of RIBL.

[24] Mrs. Morgan-Gomez posited that the Liquidators' Summonses ought to be dismissed and that the Court should order that the payment of her clients' three invoices be made out of the assets of RIBL as an expense of the liquidation.

[25] She argued, quite vociferously, that D&T, in accordance with the Companies Liquidation Rules ("the Rules"), was duly appointed and acted on the instructions of the majority of the Committee and those instructions were not contrary to the interests of the general body of creditors. She further contended that the Liquidators' argument concerning the validity of the engagement letter is a 'red herring' because the Rules do not mandate this for the engagement of counsel to the Committee as it does for the counsel to the official liquidator.

[26] Learned Counsel for the Liquidators, Mr. Moree, argued that there have been concerns expressed by a number of admitted creditors of RIBL on whether the legal fees and expenses set out in the D&T invoices were reasonably and properly incurred on behalf of the general body of creditors or on behalf of BFI and/or its agents.

[27] He further argued that the process of engaging D&T was driven principally by BFI using its majority representation on the Committee and that a review of the signatures on the engagement letter will confirm that D&T was in effect retained by BFI. He stated that the third party independent creditor who sits on the Committee (Mr. Pinto) did not support the engagement of D&T from the outset because he thought it was a waste of money as the creditors will now have to pay multiple lawyers.

[28] Mr. Moree next argued that BFI (with the assistance of D&T) was pursuing its own agenda under the guise and control of the Committee recognizing that the costs of the Committee are normally paid out of the liquidation.

[29] He contended that prior to the election of the two additional members to the Committee on 28 May 2018, BFI through two of its directors (Mr. Rodrigues and Mr. da Silva) controlled the three-member Committee and that this must be considered when determining whether the engagement of D&T benefitted the general body of creditors.

[30] Mr. Moree further contended that the engagement of D&T did not benefit the general body of creditors of RIBL and that a review of the invoices suggests that D&T received instructions exclusively from the representatives of BFI namely, Mr. Rodrigues, Mr. da Silva and Mr. James Robinson of White & Case (U.S. Counsel to BFI).

Analysis and Conclusion

The Estoppel Issue

[31] In my opinion, the issue of liability to pay D&T's invoices out of the estate of RIBL (i.e. the subject matter of the Liquidators' Summonses) has not been determined by the Court. There is nothing in the Consent Order or in its Recitals that speaks directly to this. In fact, paragraph 3 of the Consent Order clearly states: *"3. The hearing of the First Summons and the Third Summons be and is hereby adjourned to 11:00 a.m. on 7 February 2019"*. This suggests to me that the issue of liability with respect to the invoices remained extant.

[32] In the case of **Noor v UKBA** (2012) UKEAT/0546/11 at para. 37 Judge McMullen QC stated that:

> **"[37] The legal basis of the doctrine of issue estoppel has most recently and authoritatively been set out in *Bon Groundwork Ltd v Foster* [2012] EWCA Civ 252, [2012] IRLR 517] in the judgment of Elias LJ who said this:**
>
> **"4…the relevant legal principles are not in dispute, I will set them out briefly. The principle of *res judicata* can be summarized as follows: Where an issue has been litigated before a judicial body and determined as between the parties, it cannot be re-opened. It is binding as between them and the parties are estopped from re-opening it. The issue may be one of fact or of law. However, the parties are only bound by an issue which it was necessary for the court to determine in the earlier claim. In *Arnold v National Westminster Bank plc* [1991] 2 AC 93 Lord Keith of Kinkel observed that the principle applies where:**
>
> **'…a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant one of the parties seeks to reopen that issue.'**

> **5 It follows, therefore, that a finding of fact by an earlier court which is not a 'necessary ingredient' in the earlier cause of action will not give rise to a 'fact estoppel'."**
>
> **[38] The burden of establishing the identity of the issue rests on the party seeking to rely upon it: see Turner *v London Transport Executive* [1977] IRLR 44, [1977] ICR 952 at 946G per Browne LJ. In the same case, Geoffrey Lane LJ at 966F said that issue estoppel:**
>
> > **"Might all too easily become a source of injustice rather than a benefit to litigants. Quite apart from other considerations of which there are many in this field of law, a case of issue estoppel cannot begin to be established unless it can be ascertained with some degree of precision what it was that the dominant judgment in fact decided. The less formal the proceedings are in any particular case the more difficult becomes the task of deciding what the issues were."** [Emphasis added]

[33] In this regard, I find that the Consent Order does not operate as an estoppel.

The Recital Issue

[34] Recitals in an order of the Court are not operative terms and as such do not have legal effect and are unenforceable. They merely provide a background or are sometime referred to in aid of the interpretation of the body of the order.

[35] The unenforceable nature of recitals was alluded to in the High Court of Justice case of **X v T (Permission to Appeal)** [2019] EWHC 1713 (Fam) where Theis J stated that:

> **"I do consider this ground of appeal does have some prospect of success limited only to the form of the order, namely whether the time set out as a recital or as part of the body of the order. It is a narrow but important point. If matters remain as they are and there has been no time spent by the father with C the only option the father will have to seek to restore his relationship with C in accordance with what was agreed between the parties is to make a fresh application to the court, as there is no obvious route to enforce a recital"**

[36] The last Recital in the Consent Order states:

> **"AND WHEREAS D&T and MBH will seek to agree the amount to be paid to D&T in respect of the Two Invoices and the Additional Invoices (together the "D&T Invoices"), without prejudice to the right of the**

Liquidators to object to the payment of any amount in respect of the Additional Invoices."

[37] I do not accept Mrs. Morgan-Gomez's submission that because of the inclusion of the last Recital in the Consent Order, the Liquidators abandoned the issue of liability with respect to the payment of the invoices.

[38] From my interpretation of the last Recital, it merely suggests that the parties will endeavor to have without prejudice discussions and negotiations in an effort to agree an amount payable with respect to the first two invoices. This must be the correct interpretation because it would explain why the parties include paragraph 3 in the Consent Order which states:

"3. The hearing of the First Summons and the Third Summons be and is hereby adjourned to 11:00 a.m. on 7 February, 2019"

[39] Unlike the last Recital, paragraph 3 is an operative provision of the Consent Order and the reference to the *"First Summons and the "Third Summons"* refers to the application for direction with respect to the liability for the first and second invoice of D&T.

[40] In the New South Wales Court of Appeal case of **Franklins Pty Ltd v Metcash Trading Ltd** [2009] NSWCA 407 at para. 390 Campbell JA stated that:

> **"That a recital can be looked at as part of the surrounding circumstances of the contract still leaves room for the rule (accepted by intermediate court of appeal in Australia and by Isaacs J in Bebarfald & Co Ltd v Macintosh) that <u>where the recital is in conflict with the true interpretation of an operative provision (according to the modern standards of interpretation), the operative provision prevails.</u> Strictly speaking, that is not so much a rule of construction as a reflection of the fact that recitals are not operative provisions in a contract. "** [Emphasis added]

[41] In view of the above, I am of the considered opinion that the preliminary objections raised by Counsel for D&T are unsustainable.

The Liability Issue

[42] The right of D&T to have their invoices paid by the Liquidators out of the assets of RIBL is determined by whether or not D&T was properly engaged by appointment of the Committee and whether or not the fees and expenses were reasonably and properly incurred in accordance with Order 9 rule 5 of the Companies Liquidation Rules, 2012 ("the Rules").

[43] Order 9 rule 5 of the Rules provides:

> **"Counsel to the liquidation committee (O.9, r.5)**
>
> **5. (1) The liquidation committee may resolve to appoint a counsel and attorney to give legal advice to the committee, either generally or in respect of any specific matter arising in connection with the liquidation.**
>
> **(2) The counsel and attorney appointed in accordance with this rule is referred to as "counsel to the liquidation committee".**
>
> **(3) The legal fees and expenses reasonably and properly incurred by the liquidation committee shall be paid out of the assets of the company as an expense of the liquidation.**
>
> **(4) If the official liquidator or any committee member considers that the amount of the fees and expenses charged by counsel to the liquidation committee is excessive, he may require that such fees and expenses be taxed on the indemnity basis in accordance with Order 25.**
>
> **(5) Conversely, if counsel to the liquidation committee considers that the amount which the official liquidator offers to pay is inadequate, he may require that this bill of costs be taxed on the indemnity basis in accordance with Order 25.**
>
> **(6) Counsel to the liquidation committee shall be entitled to be paid out of the assets of the company as an expense of the liquidation the amount(s) stated in the costs certificate and the official liquidator shall have no authority to pay more than that amount."**

[44] The initial composition of the Committee consisted of BFI, Mr. Rocha and Mr. Pinto. BFI appointed Mr. Rodrigues (a director of BFI) as its proxy to attend and vote for it at all Committee meetings. Mr. Rocha initially appointed Mr. da Silva (also a director of BFI) to the Committee as his proxy but later replaced him with

Mr. Rodrigues as his proxy. This resulted in BFI effectively having two of three votes on the Committee with its proxy, Mr. Rodrigues, exercising those two votes.

[45] At a meeting of the Committee on 21 March 2017, a resolution was passed by a majority vote to appoint D&T as its legal counsel. This was sufficient for the purposes of Order 9 rule 5 of the Rules. In this regard, I accept the submission advanced by Mrs. Morgan-Gomez that the validity of the engagement is a *'red herring'* for the purposes of determining whether D&T were property appointed by the Committee.

[46] In my judgment, D&T were duly appointed by the Committee and, as such, RIBL is liable to pay all of D&T's legal fees and expenses that were reasonably and properly incurred from the date of their appointment until termination or otherwise.

[47] D&T's appointment as Counsel to the Committee was formally terminated by a resolution passed by the majority of the five members of the Committee on the 28 May 2018.

[48] Further, paragraph 5 of the February 2018 Order specifically states:

> **"5. All further instructions to Counsel for the Committee and matters relating to their engagement shall be deferred until after the election of the two additional members of the Committee under paragraph 3 above."**

[49] Therefore, D&T ought not to have continued work or acting on instructions from the Committee (or any member thereof) until after the election of the two additional members of the Committee or upon further direction of the court.

Taxation

[50] Order 25 rule 4 of the Rules provides:

> **"Criteria applicable to taxation (O.25, r.4)**
>
> **4. (1) The liquidator's counsel is entitled to be fairly remunerated in accordance with the terms of his engagement letter <u>for all work</u>**

reasonably and properly done on the instruction of the official liquidator.

(2) In determining whether the remuneration claimed is fair, the taxing master shall have regard to all the relevant circumstances, including –

(a) the difficulty or novelty of the issues involved;

(b) the skill, specialised knowledge and responsibility required of, and the time and labour expended by, the counsel and attorneys engaged;

(c) the number and importance of the relevant documents (however brief) prepared or perused;

(d) the overall size of the estate;

(e) the amount of money or value attributable to the issues involved; and

(f) the overall importance to the liquidation of the issues involved.

(3) In determining whether the work done by the liquidator's counsel was reasonably and properly done, the taxing master shall have regard to all the relevant circumstances, including—

(a) the duties of the official liquidator;

(b) the instructions given by the official liquidator; and

(c) any relevant directions given by the court.

(4) Work done by the liquidator's counsel shall be presumed not to have been done reasonably and properly if the work done or advice given caused or contributed to a breach of duty on the part of the official liquidator.

[51] Order 59, rules 7 and 8 of the Rules of the Supreme Court 1978 ("RSC") are also instructive. Both rules empower the Court to disallow any costs that it deems improper and unnecessary. Rules 7 and 8 provide:

"7. (1) Where in any cause or matter anything is done or omission is made improperly or unnecessarily by or on behalf of a party, the Court may direct that any costs to that party in respect of

it shall not be allowed to him and that any costs occasioned by it to other parties shall be paid by him to them.

(2) Without prejudice to the generality of paragraph (1) the Court shall for the purpose of that paragraph have regard in particular to the following matters, that is to say –

(a) the omission to do any thing the doing of which would have been calculated to save costs;
(b) the doing of any thing calculated to occasion, or in a manner or at a time calculated to occasion, unnecessary costs;
(c) any unnecessary delay in the proceedings.

8. (1) Subject to the following provisions of this rule, whether in any proceedings costs are incurred improperly or without reasonable cause or are wasted by undue delay or by any other misconduct or default, the Court may make against any attorney whom it considers to be responsible (whether personally or through a servant or agent) an order –

(a) disallowing the costs as between the attorney and his client; and
(b) directing the attorney to repay to his client costs which the client has been ordered to pay to other parties to the proceedings; or
(c) directing the attorney personally to indemnify such other parties against costs payable by them."

First Invoice

[52] In the First Invoice dated 6 October 2017, D&T claims the sum of B$87,093.55 as fees and expenses reasonably incurred between the period 20 June 2017 to 2 October 2017.

[53] Mr. Moree appearing as Counsel for the Liquidators submitted that this invoice contains two entries on 18 July 2017 (for B$1,125.00 and B$1,625.00 respectively and one entry on 23 August 2017 (for B$37.50) with references to communications between D&T and Mr. James Robinson of White & Case, US Counsel to BFI ("Mr. Robinson"). It also contains two entries on 3 July 2017 (for B$325.00) and on 4 July 2017 (for B$450.00) respectively with respect to "*Receipt, reviewed and considered email obtained from LC Representatives and response to Monique"*

and "Receipt, reviewed and considered response to Monique and responses related thereto".

[54] Mr. Moree also queried the numerous entries in this invoice relating to the US litigation involving RIBL during the period from 27 June 2017 to 4 July 2017 in the aggregate amount of B$12,732.50. According to Mr. Moree, it did not benefit the general body of RIBL's creditors that D&T spent time monitoring the US Litigation. He argued that RIBL had US Counsel representing it in that litigation and the Liquidators' Bahamian Counsel oversaw the matter. Accordingly, he contended that D&T's time in dealing with the US Litigation should be disallowed. I agree.

[55] Mr. Moree also argued that D&T spent time in connection with BFI's request that the Liquidators obtain from their Counsel an opinion regarding the potential liability of the Central Bank as a result of the collapse of RIBL. As this opinion was obtained on the request of BFI, none of D&T's time in dealing with the matter should be paid out of RIBL's estate as an expense of the liquidation. I also agree.

[56] Mr. Moree next submitted that the Liquidators queried the second through fourth entries made on 27 September 2017 which total 43 hours or B$19,350.00 (the First Lump Sum Entries") including 30 hours or B$13,500.00 for *"legal research of Statute(s) Regulation(s), Common Law, Authorities, electronic alternate resources to include consultant Counsel for a period over four (4) weeks".* I will allow 18 hours or B$8,100.00 instead of B$20,250.00.

[57] Mr. Moree further submitted that this invoice also contains two entries on 8 September 2017 and 27 September 2017 in the aggregate of B$4,050.00 for D&T's time in attending the Supreme Court Registry and reviewing the Supreme Court file. Mr. Moree submitted that based on the limited information available in connection with these entries, the Court must consider whether this work was necessary and therefore reasonable before allowing these fees to be paid out of RIBL's estate.

[58] In my opinion, I will allow this as being necessary. Invariably, attorneys review court files to ensure that they have all orders and documents particularly in a case such as this which commenced in 2013.

[59] Overall, in scrutinizing the First Invoice dated 6 October 2017, I find that all work done and fees incurred by D&T were reasonable and proper (with the exception of those queried by Mr. Moree (see paragraphs 53-56 above). Those fees and expenses are disallowed.

[60] With respect to fees (B$17,595.00) in this invoice incurred by D&T in communicating with Mr. Tom Lowe, QC ("Mr. Lowe QC"), an English barrister who appears to have worked for D&T on certain matters relating to the Committee and RIBL, I shall deal with them under the Second Invoice.

Second Invoice

[61] The Second Invoice covers the period 25 October 2017 to 19 February 2018 with the exception of one entry at the beginning of the invoice for 0.5 hours on 22 August 2017. This entry ought to be in the First Invoice but, in any event, I will allow it as it involves "*Receipt, reviewed and considered email correspondence from Liquidation Committee Representative" in the amount of B$225.00.*

[62] According to the Liquidators, the Second Invoice is for B$252,285.66 and covered a period of only 4 months. Thus, they have a real concern over the amount and its reasonableness which is said to have been reasonably and properly incurred by D&T. A comprehensive breakdown of the challenge can be found in the Ferere Affidavit filed on 24 May 2018.

[63] The Second Invoice contains numerous references to Mr. Lowe QC. According to the Liquidators, to date, they have not received an invoice from Mr. Lowe QC and neither the First Invoice nor the Second Invoice reflects any fees or charges of Mr. Lowe, although lawyers of D&T have recorded in those invoices a substantial amount of time in connection with their dealings with him.

[64] On 27 October 2017, Mr. Thomas Dean of D&T ("Mr. Dean") sent a letter to Mr. Moree advising him, *inter alia,* that D&T had received instructions to retain a Queen's Counsel. This was after the Committee by a majority (BFI and Mr. Rocha (through their respective representatives who are both directors of BFI) indicated that they agreed with the engagement of Mr. Lowe QC.

[65] Order 9, rule 4(9) of the Rules provides that any action of a liquidation committee outside of a meeting requires the unanimous written consent of all committee members. In paragraph 34 of the Second Affidavit of Terrence Gape ("Mr. Gape"), he concedes that "….*Mr. Lowe, QC is not and has not been retained by the Liquidation Committee".*

[66] The Liquidators argued that it is pellucid that Mr. Lowe QC has carried out work in connection with RIBL and the Committee and has had dealings with D&T on this matter. According to Mr. Moree, it can be reasonably inferred that he was paid for such work and it is extremely relevant to ascertain whether BFI or persons or entities on behalf of BFI made such payments. Given the extent of the consultations with Mr. Lowe QC and the application by D&T for his special admission to the Bahamian Bar to represent the Committee (which the Liquidators objected to and which was declined to by the Bar Council), it is critical to achieve transparency on this issue to determine the true position.

[67] Mr. Moree argued that Mr. Gape states in his Second Affidavit that (i) the references in the First Invoice to 'Senior Counsel' and 'Consultant Counsel' "*…reflect [ ] D&T's time spent in these proceedings"* (ii) *"…the recorded time spent [is] reflective of members/employees/partners/associates of D&T;* and *(iii) "D&T…has …accounted for its time with Mr. Tom Lowe…".* According to Mr. Moree, the obvious question arises as to who was Mr. Lowe QC representing (particularly as Mr. Gape states that it was not the Committee) and why D&T was consulting him.

[68] Mr. Moree submitted that D&T now seem to be taking the position that all references to 'senior counsel', 'consultant counsel' and 'lead counsel/attorney' refer to Mr. Gape rather that Mr. Lowe QC. He further submitted that this contention must be considered in the context of the following entries in the First Invoice namely:

> "On 8/17/2017 Mr. Gape charged time for *"Email correspondence to Lead Counsel;"*
>
> *"On 9/26/2017, Mr. Gape charged time for "…consultation with Lead Attorney…" and*
>
> *"On 9/29/2017, Mr. Gape charged time for "Consultation with Lead Counsel".*

[69] Further, Mr. Gape's time has been separately accounted for in the D&T Invoices. Accordingly, all of Mr. Gape's time in consulting with other attorneys of D&T would have been recorded in the invoices (unlike Mr. Lowe's time). In that vein, says Mr. Moree, none of the time spent by D&T in dealing with 'senior counsel', 'consultant counsel', 'lead counsel/attorney' or 'Tom/Thomas Lowe QC' should be payable out of RIBL's estate as Mr. Lowe QC was never validly engaged by the Committee.

[70] Mr. Moree stated that it appears *ex facie* that at least B$17,595.00 of the First Invoice and B$31,447.00 of the Second Invoice relate to fees incurred by D&T in communicating with or taking other actions in respect of Mr. Lowe QC. This includes the time spent by D&T in their unsuccessful attempt to have Mr. Lowe QC specially admitted to the Bahamian Bar to represent the Committee. The Second Invoice also contains an expense of B$1,000 describing as "*Processing Fee for Special Admission of Thomas Lowe Q.C. to the Bahamas Bar*".

[71] Mr. Moree concluded that until there is full disclosure about the role of Mr. Lowe QC and the reason for the extensive consultations with him, none of D&T's fees and expenses incurred in communicating with or other actions taken in respect of Mr. Lowe QC (at least B$50,042.00 in respect of the First Invoice and the Second invoice) should be paid out of the assets of RIBL as an expense of the liquidation.

[72] It is true that Order 9, rule 4(9) of the Rules provides that any action of a liquidation committee outside of a meeting requires the unanimous written consent of all committee members and that Mr. Gape concedes that "….*Mr. Lowe, QC is not and has not been retained by the Liquidation Committee".*

[73] For my part, I sympathize with the Committee for not seeking some directions from the court on whether Mr. Lowe QC should have been retained. The proceedings before me on 1 February 2018 were extremely contentious. It was pellucid that the Committee should have been represented by a Queen's Counsel (no disrespect to Mr. Dean who argued to the best of his ability). In my respectful view, it was unfortunate that the Liquidators objected to the admittance to the Bahamian Bar of Mr. Lowe QC. After all, they had an eminent Queen's Counsel to represent them. It is an overriding objective of Order 31A of the Rules of the Supreme Court ("RSC") that the playing field should be equal and no party should gain an unfair advantage (my interpretation of the rules).

[74] That being said, since there was no resolution from the Committee giving authority to D&T to engage the services of Mr. Lowe QC, with great regret, the fees and expenses of D&T in communicating with him are disallowed.

[75] There are other fees being claimed by D&T as being reasonably and properly incurred to which the Liquidators object: see paragraphs 45 to 51 of the Skeleton Submissions of the Joint Official Liquidators dated 22 March 2019.

[76] Specifically, the Liquidators referred to paragraph 20 of the Ferere Affidavit which sets out the following entries in this invoice for large lump sums which in some instances exceed the number of hours in one day and amount to an aggregate of $60,390.00 ("the Second Lump Sum Entries"). Notably,

- On 29 January 2018, Mrs. Ruby Gray charged 35 hours (B$15,750.00);
- On 31 January 2018, Mr. Dean charged 40 hours (B$18,000.00);

- On 31 January 2018, Mr. Dean charged a further 36.1 hours (B$16,245.00) which brings the total hours for that day to 76.1 hours; and
- On 31 January 2018, Mrs. Gray charged 23.1 hours (B$10,395.00).

[77] In his Second Affidavit, Mr. Gape addressed it by stating, in paragraphs 35-37, *inter alia,* that "…*these time allotments/entries comprise more than one day which was previously explained to the Joint Official Liquidators and Counsel thereto. I would submit that it is not unusual for billing/invoice to take that format."*

[78] Like the Liquidators, I disagree with that format. Invoices seeking payments of costs must be accurate and detailed. They must provide reasonable explanation for any sums claimed especially when it is a large sum, as is presently being claimed. In an email to the Liquidators' Counsel on 15 December 2017 (referred to in paragraph 37 of the Second Gape Affidavit) Mr. Dean explained in respect of the First Lump Sum Entries as follows:

> **"This remains a private commercial matter by and between the clients with respect to our firm's billing practice (s) which we assume remains consistent with many international firms preparing legal opinion (s) with particular regard to the research tasks and we would (respectfully) submit that our firm's billing practices remain [ ] accurate and in this case likely understated so as to be considerate as regards the appreciable costs being incurred by the parties and those corollary. Kindly note that the research for the legal opinion was not only completed by myself but also with associates and other paralegals which the undersigned elected not to include so as to not waste the estate's funds."**

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[79] Mr. Moree submitted that the Second Invoice is very detailed – 48 pages. The Second Lump Sum Entries, says Mr. Moree, are inconsistent with that format and there is no explanation as to why all of this time was grouped together and recorded on two specific days.

[80] Mrs. Ferere, at paragraph 21 of the Ferere Affidavit, opined that the following entries do not appear to be accurate namely:

a) On 18 December 2017, Mrs. Gray charged B$3,500.00 for attending Court and on 19 December 2017, Mr. Dean charged 10 hours (B$4,500) for a court attendance. The Liquidators are correct that there was only one court appearance on 18 December 2017 which lasted approximately one hour and no Court hearing on 19 December 2017. The Court will allow the sum of B$3,500.00 to Mrs. Gray for attending Court and disallow the sum claimed by Mr. Dean.

b) On 26 January 2018, Mrs. Gray charged 8 hours (or B$3,600) for considering the Supplemental Affidavit of Ms. Treco sworn to on 26 January 2018. However, say the Liquidators, Counsel for the Liquidators did not send that Affidavit to D&T until after 6 p.m. when there were only 6 hours left in that day. In the Liquidators' view, Mrs. Gray should have spent no more than 3 hours (or B$1,350.00) in considering the Affidavit. Accordingly, the Liquidators submitted that B$2,250.00 of this entry should be disallowed. I do not agree with the Liquidators. They had the benefit of a Queen's Counsel while Mrs. Gray was not entitled to that benefit because of the Liquidators' objection. I will therefore allow the full amount to Mrs. Gray for 8 hours (until 2.00 a.m.).

[81] In scrutinizing the invoice and taking into consideration all objections raised by the Liquidators and the Reply to those objections, I find that all work done and fees incurred by D&T as contained in the Second Invoice were reasonable and proper (except for the items referred to in paragraphs 70-80 (a) which are disallowed).

[82] The Court has not done an overall calculation of the exact figure that is allowed but I am confident that Counsel will be able to do so.

The Third Invoice

[83] The Third Invoice covers the period 5 March 2018 to 31 January 2019 with one entry dated 30 January 2018 (which will be allowed"). Since the Third Invoice

covers fees and expenses subsequent to the February 2018 Order, they are disallowed.

[84] Paragraph 5 of the February 2018 Order is crystal clear. It means what it says.

[85] Therefore, with the exception of the entry dated 30 January 2018 which should have been in the Second Invoice, all fees and expenses incurred after the February 2018 Order will be disallowed.

[86] My decision on the Third Invoice is supported by Order 25, rule 4(3)(c) which in effect states that:

> **(3) In determining whether the work done by the liquidator's counsel was reasonably and properly done, the taxing master shall have regard to all the relevant circumstances, including—**
> **(a) the duties of the official liquidator;**
> **(b) the instructions given by the official liquidator; and**
> **(c) <u>any relevant directions given by the court</u>.** [Emphasis added]

Costs of this application

[87] After considering the Ruling, should the parties be unable to agree on the costs payable (if any) of the Liquidators' Summonses, there shall be liberty to apply for further directions.

Dated 2nd day of March, A.D. 2021

Indra H. Charles
Justice