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Landmark decision prescribes modern approach

Modern Approach adopted in the Bahamas to the exercise of Liquidators' powers of examination

In a recent landmark decision for Bahamian jurisprudence in the field of insolvency the Supreme Court set out and applied the modern approach to the determination of an application by Joint Liquidators for production of documents and oral examination of named Partners of the former auditors of a Company in voluntary liquidation.

The Liquidators applied ex parte for an order for production of documents and for oral examination. No justification for proceeding ex parte was given by the Liquidators other than that it was the usual practice per Re Gold Company (1879). The Court held that, as reflected by the judgments in Re Maxwell Communications Corp plc (No.3) 1 BCLC 521 and in Re Murjani (1996) 1 BCLC 272 the modern practice was that such applications should be made on notice unless there was good reason justifying an application ex parte and, there being no good reason, it accordingly directed that the matter proceed inter partes.

At no time prior to the hearing had the Liquidators disclosed to the Auditors the particular areas or topics that the Liquidators wanted to discuss with them, nor did they at any time ask the Auditors for any specific information or answers to any questions with respect to the Company. The first time the Auditors became aware of the topics or subject areas in respect of which the Liquidators sought information was during the course of the hearing itself.

Endorsing the summary of the law given by Lord Millet sitting as a judge of the Court of Final Appeal of Hong Kong in Joint & Several Liquidators of Kong Wah Holdings Ltd v Grande Holdings Ltd (2007) 1 HKLRD 116 with reference to British & Commonwealth Holdings plc v Spicer & Oppenheim (1992) Ch 342; British & Commonwealth Holdings plc v Spicer & Oppenheim (1993) AC 426; Re Bank of Credit and Commerce International SA (No. 12) (1997) 1 BCLC 526 and Cloverbay Ltd (Joint Administrators) v Bank of Credit and Commerce International SA (1991) Ch 90 the Supreme Court held that the same approach should be adopted by the Courts of the Bahamas to applications by Liquidators under the relevant sections of the Companies Act and the International Business Companies Act.

The Auditors submitted that, in light of their extensive production of documents which had included all their audit files and working papers and the Liquidators' failure to request any information or to give any indication as to the matters in relation to which they required further information, the Liquidators' application was wholly unreasonable, unnecessary and oppressive.

The Court considered the approaches adopted by Vinnelot J in the cases of Re Norton Warburg Investment Holdings Ltd (1983) 1 BCC 98907 and Re Maxwell Communications Corporations plc No.3) (1995) and, having regard to the circumstances, held that the Liquidators had been unreasonable and that their application that the Auditors be orally examined was indeed oppressive.

The Court ordered that such further information as the Liquidators required be obtained by written Interrogatories; that the Liquidators pay the Auditor's costs of and occasioned by the proceedings and the Auditor's costs of producing the documents as well as their costs, at their hourly rates, of answering the Interrogatories. Such costs, together with those of the Liquidators, were ordered to be paid by the Company. The Court also granted other ancillary orders sought by the Auditors restricting the use to which their Answers might be put by the Liquidators and imposing limitations on disclosure.

Ms. Metta MacMillan-Hughes and Ms. Anishka Pennerman appeared for the Auditors.

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