

**GRENADA**

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

**CLAIM NO. GDAHCV2003/0255**

**IN THE MATTER OF BANK CROZIER LIMITED  
(IN LIQUIDATION)**

**AND**

**IN THE MATTER OF THE OFFSHORE BANKING ACT 1996, NO.39**

**AND**

**IN THE MATTER OF THE COMPANIES ACT, 1994, NO.35**

**AND**

**IN THE MATTER OF THE INTERNATIONAL COMPANIES ACT. CAP. 152**

**BETWEEN:**

**DARYL SANDS  
CONTROLLER OF BANK CROZIER LIMITED**

Applicant

**AND**

**GARVEY LOUISON  
LIQUIDATOR OF BANK CROZIER LIMITED**

Respondent

Seenath Jairam SC and Stephen Singh for the Controller, instructed  
By Leslie Ann Seon-Hulokoff.  
Clement E Lashley QC for the Liquidator.

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**IN THE MATTER OF THE INTERNATIONAL COMPANIES ACT. CAP. 152**

**BETWEEN:**

**PETER I. FOSTER  
LIQUIDATOR  
BANK CROZIER INTERNATIONAL LIMITED  
(IN LIQUIDATION)**

Applicant

**AND**

**DARYL SANDS  
CONTROLLER BANK CROZIER**

**AND**

**GARVEY LOUISON  
LIQUIDATOR  
BANK CROZIER LIMITED**

Respondent

Anthony Astaphan SC instructed by Celia Edwards for Peter I. Foster.  
Seenath Jairam SC and Stephen Singh for the Controller, instructed by  
Leslie Ann Seon-Holukoff.  
Clement E. Lashley QC and Shawn Lewis for the Liquidator.

2006: September 22, 26, October 6

December 20

**DECISION:**

- [1] **BAPTISTE, J.:** There are two applications. The substantive application is that of Daryl Sands. It concerns the issue of indemnification. The matter is on remit from the Court of Appeal. The High Court has been directed to determine the following:
- (1) Whether Daryl Sands in his capacity as Controller of Bank Crozier Limited is entitled to a right of indemnification from the estate of Bank Crozier for all costs and expenses arising from his function as Controller, including any contingent liabilities;
  - (2) Whether the right of indemnification is secured by the assets of Bank Crozier in priority to the Liquidator and the general body of creditors, subject only to prior secured interests.
- [2] The second application is that of Peter Foster. Mr. Foster seeks: (1) to be added as a party to the indemnification application; (2) permission to intervene as an interested party in the indemnification application; (3) leave to be heard orally and in writing as an interested party at the hearing of the indemnification application.
- [3] Mr. Ataphan's application that both matters be heard together was stoutly resisted by Mr. Jairam, SC. Mr. Jairam also took exception to the fact that the skeleton arguments with respect to both application were put before the Court, contained as they were, in one document. Somehow or another, Mr. Jairam felt that this could prejudice the Court's mind. The Court however, in the exercise of its discretion, granted the application, being of the view that it would save judicial time. In any event, no injustice could be occasioned by hearing the both applications. The Court proceeded to hear Mr. Foster's application first. That application was strenuously opposed by Mr. Jairam. It was however supported by Mr. Lashley, QC. Hearing of the substantive application was adjourned at the request of Mr. Jairam due to late service of the skeleton argument of the Liquidator (Garvey Louison).
- [4] The grounds of Mr. Foster's application are:
- (1) In his capacity as Liquidator of Bank Crozier Limited (In Liquidation) he is a person entitled to the fruits of a Consent Order and Judgment of the High Court of Grenada to be paid from the assets of Bank Crozier Limited (In Liquidation) Grenada and will be

directly affected by an order for an indemnity in favor of Daryl Sands.

- (2) Alternatively, he is a person interested in the application filed by Daryl Sands and or the outcome of the said application for an indemnity.
- (3) He is a party to a Settlement Agreement between Bank Crozier International Limited (In Liquidation) (St. Lucia) and Bank Crozier Limited (In Liquidation) (Grenada) dated 24<sup>th</sup> November , 2005 in which the Liquidator of Bank Crozier Limited (In Liquidation) (Grenada) in the exercise of this statutory powers agreed to settle and pay an outstanding claim of Bank Crozier International Limited (In Liquidation) in the sum of US\$2,000,000.00
- (4) His rights and interest as Liquidator, his entitlement under the Settlement Agreement, Consent Order and Judgment and the liquidation of Bank Crozier International Limited (In Liquidation) in Saint Lucia will be seriously affected if the Court grants the application filed by Daryl Sands.
- (5) Daryl Sands is not entitled to an indemnity.

[5] The application is made under Part 19 of the Civil Procedures Rules 2000, the inherent jurisdiction of the Court and or the principles of fairness. Mr. Jairam contended that Mr. Foster is not entitled to be joined as a party or to intervene. The proceedings are in substance and form insolvency proceedings and Part 2 of the Civil Procedure Rules specifically excludes insolvency proceedings (including winding-up of companies). Mr. Astaphan, SC argue that it is an application to intervene in an indemnity proceeding. It is not an insolvency proceeding.

[6] I do not think that it would be correct for the Court to perform a dissecting operation and isolate or treat the application as if it existed in vacuo. The Court must pay regard to the reality of the situation which is, that the proceedings are in substance and form insolvency proceedings. Part 2 of the Civil Procedure Rules specifically excludes insolvency (including winding-up

of companies). In the circumstances, I am in agreement with Mr. Jairam that the Civil Procedure Rules do not apply to this matter. Insofar as the application is based on the Civil Procedure Rules 2000, it cannot succeed.

- [7] Mr. Jairam contended that the applicant has no standing before this Court, not having been a party to the application in its initial stage when the matter was before Justice Pemberton in a Notice of Application filed on July 30, 2003 or at the appeal stage. The Applicant has not sought leave at the proper stages to file the present application, especially in light of the fact that the Court only acknowledged the applicant's counsel at the appeals as *amicus curiae*. In order to have standing before this Court the applicant was required to secure leave from the Court of Appeal in Civil Appeals Nos. 27 & 30 or should have applied for leave to intervene at the appropriate time in the within appeals. As a non-party before the Court of Appeal, which has referred specific issues between specified parties to this Court, the applicant's Notice of Application absent leave is not permitted by law. Notwithstanding the applicant's failure to secure leave, the applicant would not have been a proper party to the dispute underlying the subject appeal in any event and should not be heard by this Court in relation to this application.
- [8] Mr. Jairam further submitted that the Civil Procedure Rules do not have any provision permitting a person claiming to be affected by an appellate order to apply without leave to alter or vary such an order. Absent such a rule, the common law prohibits such applications from proceeding without leave. The Applicant as *amicus curiae* at the appeals is not a party to these proceedings and does not enjoy the catalogue of rights associated with party status. The Applicant's lack of standing to bring the application is further confirmed by virtue of the fact that he occupies the role of an ordinary creditor in relation to the estate of Bank Crozier and would not be in any event a proper party to the appeal or to the claim herein.
- [9] Mr. Lashley QC submitted that Mr. Foster has kind of *locus standi* which entitled him to intervene/ Mr. Foster is entitled to bring an action in his own right and is entitled to be joined as an intervener. The inherent jurisdiction of the Court should dispose of the objection.
- [10] It would be appropriate at this stage to consider the inherent jurisdiction of the Court. The inherent jurisdiction of the Court has been defined as being the reserve or fund of powers which the Court may draw upon as necessary

whenever it is just and equitable to do so, in particular to ensure the observance of due process of law, to prevent improper vexation or oppression to do justice between the parties and to secure a fair trial between them. It may be exercised even in respect of matters regulated by statute or rules of court. The inherent jurisdiction of the Court is part of procedural law and not part of substantive law. It may be invoked not only in relation to parties in pending proceeding but in relation to anyone whether a party or not, and in relation to matters not raised in litigation between the parties. (See Halsbury's Laws of England 4<sup>th</sup> Ed. Volume 37 para 14.)

- [11] In **Deloitte & Touche AG v Johnson** [1999] 1 WLR 1605, Lord Millett stated at page 1611, letter C:

‘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.’

At letter D, page 1611, Lord Millett stated:

‘‘Where the court is asked to exercise a statutory power, therefore, the applicant must show that he is a person qualified to make 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, as the plaintiff submits, that he has an interest in making the application or may be affected by its outcome.’ It means that he has a legitimate interest in the relief sought.’

- [12] I have no doubt that the latter statement of Lord Millett would also be applicable where the Court is asked to exercise its inherent jurisdiction. In my judgment, the inherent jurisdiction of the Court provides an adequate answer to the objections raised to the applicant. The applicant is a creditor of the company in liquidation. He is the beneficiary of a Settlement Agreement with the liquidator who agreed to pay \$2,000,000.00; and Consent Order and Judgment delivered by the Court giving legal effect and judicial sanction to the agreement made with the liquidator. As a creditor and a person entitled payment under the Agreement, Consent Order and Judgment, the applicant has a vested interest in the ultimate distribution of the assets of the company. The application for indemnity can certainly affect the liquidation and the applicant has a legitimate interest in the relief sought. The applicant does have standing to bring the application.

[13] Mr. Jairam submitted that a liquidator when sued represents all the creditors and no other party is a necessary party. Mr. Jairam relied upon the reasoning in **Re Youngs, Doggett v Revett** [1885] 3 Ch D 421. In **Re Youngs** it was held that leave cannot be given to a residuary legatee to appeal from a decree made against the executor at the suit of a creditor as the executor completely represents the estate for the purposes of such suit. Mr. Astaphan urged the Court to accept the Privy Council's decision in **Deloitte & Touche AG v Johnson** as it contains the correct principle. Insofar as the inherent jurisdiction of the Court has been invoked, the principle in **Deloitte & Touche AG v Johnson** would be more applicable and I so apply it.

[14] Further, Mr. Astaphan contended that Section 81 of the Bankruptcy Act Cap 27 and Section 398 (3) and 399 (5) of the Companies Act (35 of 1994) illustrate the point that simply because the liquidator is acting for the company, a person aggrieved is not precluded from applying to the Court in relation to any decision made by him.

Section 398 (3) of the Companies Act provides that:

“ the exercise by the liquidator in a winding up by the court of the powers conferred by this section shall be subject to the control of the court, and any creditor or contributory may apply to the court with respect to any exercise or proposed exercise of any of those powers.:

Section 399 (5) of the Companies Act provides that:

“If any person is aggrieved by any act or decision of the liquidator, that person may apply to the court, and the court may confirm reverse, or modify the act or decision complained of, and make such order as it thinks fit.”

[15] The statutory scheme clearly illustrates that a creditor is entitled to approach the Court notwithstanding representation of the company by the liquidator. Mr. Foster is therefore not barred from making the present application.

[16] In my view, the fact that the application was not made at an earlier stage does not bar the applicant from invoking the Court's inherent jurisdiction at this stage. Further, the application is not an appeal. It does not vary or alter the Court of Appeal's Order.

[17] In the Circumstances, the application of Peter I. Foster succeeds and an order is granted in terms of paragraph 3 of the draft order. It is ordered that Peter I. Foster, Liquidator of Bank Crozier International Limited (In Liquidation) of 25 Brazil Street, Castries, St. Lucia, is given leave to be heard orally and in writing as an interested party at the hearing of the application filed by Daryl Sands, Liquidator, Bank Crozier Limited (In Liquidation) on 10<sup>th</sup> March, 2006.

[18] I now consider the substantive issues which are:

- (1) Whether Daryl Sands in his capacity as Controller of Bank Crozier is entitled to a right of indemnification from the Estate of Bank Crozier for all costs and expenses arising from his function as Controller including any contingent liabilities; and
- (2) Whether the right of indemnification is secured by the assets of Bank Crozier in priority to the liquidator and the general body of Creditors subject only to prior secured interests.

[19] Before examining the issues I will briefly refer to the background facts. On 31<sup>st</sup> July 2002 the Minister of Finance appointed Daryl Sands Controller over the affairs of Bank Crozier. The appointment was made pursuant to Section 20 (1) (v) of the Offshore Banking Act No. 39 of 1996. Mr. Sand's appointment expired on 14<sup>th</sup> August 2003 having been extended three times by the Minister. The Minister's notice announcing the appointment provided: "Please note that in accordance with the provisions of Section 20 of the Act you will be responsible to settle all costs, fees, charges and expenses incurred by the appointee".

[20] The Controller caused all Bank accounts at the Bank to be frozen effective 22<sup>nd</sup> April 2003. Subsequent to the suspension of trading activities, the Controller was approached by two of the Bank's depositors who attempted to withdraw their holdings despite the freeze imposed by the Controller. The Controller refused to accommodate their requests and they filed claims against him alleging various misconduct and breaches of duty. Claim No 2003/220 was filed against Bank Crozier, Daryl Sands and the Minister of Finance by Carle Bella Limited alleging breaches of duty and negligence by the Controller. The Carla Bella claim in Grenada was discontinued but an action was filed by Carla Bella in Canada, in relation to the same subject matter. This matter is being defended by the Controller. On 30<sup>th</sup> May 2003 Grenville

Winslow Phillip, Controller of Bank Crozier International Limited (BCIL) commenced a law suit against the Controller – Claim No 2003/0028. The Controller instructed counsel and filed defenses in both claims.

[21] On 24<sup>th</sup> July 2003, the Bank was wound up by order of the Court and Garvey Louison appointed Liquidator. Paragraph 11 of the Order stated:

“All actions proceedings and any claims whatsoever initiated against the Bank, its assets are hereby stayed and no person which shall include a body corporate shall bring or continue with a claim or proceeding against the Liquidator or the Bank without leave of the Court.”

At the time of the order, the two claims referred to earlier were in existence against the Bank.

[22] With these background facts I proceed to examine the bases of the Controller’s claim to an indemnity. I will deal just with the statutory regime.

Section 20(1) of the Offshore Banking Act provides:

“Whenever the Minister is of the opinion that a licensee-

- (a) Is or appears likely to become unable to meet its obligations as they fall due;
- (b) Is carrying on business in a manner detrimental to the public interest or the interest of its depositors or of the beneficiaries of any trust or its creditors;
- (c) Has contravened any provision of this Act;
- (d) Has fail to comply with any conditions of its license;
- (e) Is carrying on offshore banking business in such a manner which will affect Grenada adversely as an offshore banking centre; or
- (f) Had been granted a license upon a wrong assumption or suppression of material fact;

He may forthwith do all or any of the following:

- (i) Revoke the license;
- (ii) Insert new conditions in the license or amend or revoke any existing conditions;
- (iii) Require the substitution of any officer of the licensee;
- (iv) At the expense of the licensee appoint a person to advise the licensee on the proper conduct of its affairs and to report to him within three months of the date of his appointment;
- (v) At the expense of the licensee appoint a person to make a special examination under conditions of secrecy or to assume control over the affairs of the licensee (or in the case of a licensee that is licensed under the Banking Act, 1993 to assume control of the offshore banking affairs of the licensee) with like power of a receiver appointed under the Bankruptcy Act; or
- (vi) Require such action to be taken by the licensee as he considers necessary in the circumstances.”

Subsections 7 and 8 of section 20 of the Offshore Banking Act state respectively:

“A person appointed under this section shall from time to time at his discretion and in any case within three months from the date of his appointment prepare and furnish a report to the Minister or his appointee of the state affairs of the licensee and his observation and recommendation thereon; and the Minister may in any particular case extend the period within which the person appointed could make his report containing his observation and recommendation.”

“On receipt of a report under subsection (7) the Minister may –

- (a) Revoke the appointment of the person appointed under subsection (1) (iv) or (v);
- (b) Extend the period of the appointment of the person appointed;
- (c) Subject to such conditions as he may impose, allow the licensee to organize its affairs in such manner as may be approved by him; or

- (d) Revoke the license and, in the case of a licensee not licensed under the Banking Act 1993, apply to the Court for an order that the business of the licensee be wound up.”

[23] Section 12 of the Bankruptcy Act provides:

“The receiver and interim receiver (if any) shall give security and account in such manner as the Court shall from time to time direct, and shall receive such remuneration as the creditors may by resolution at an ordinary meeting determine, or, in default of any such resolution, as the Court may direct”

[24] Section 63 (1) of the bankruptcy Act provides that the duties of the receiver shall have relation both to the conduct of the debtor and to the administration of his estate. The duties of the receiver in relation to the debtor are set out in section 63 while the duties of the receiver in relation to the estate are set out in section 64.

Section 63 provides:

As regards the debtor it shall be the duty of the receiver-

- (a) To investigate the conduct of the debtor and to report to the Court, stating whether there is reason to believe that the debtor has committed any act which constitutes an offence under this Act, or an act of default in respect of which the Court or a magistrate is empowered to commit him to prison under the provisions of the Civil Procedure Act, or an act which would justify the Court in refusing, suspending or qualifying an order for his discharge;
- (b) To make such other reports concerning the conduct of the debtor as the Court may direct;
- (c) To take such part as may be directed by the Court in the public examination of the debtor;
- (d) To take such part and give such assistance in relation to the prosecution of any fraudulent debtor as the Court may direct or as may be required by the Attorney General.

Section 64 provides:

- (1) As regards the estate of the debtor it shall be the duty of the receiver-
  - (a) Pending the appointment of a trustee, to act as interim receiver of the debtor's estate;
  - (b) To summon and preside at the first meeting of creditors;
  - (c) To issue forms of proxy for use at the meetings of creditors;
  - (d) To report to creditors as to any proposal the debtor may have made with respect to the mode of liquidating his affairs;
  - (e) To advertise the receiving order, the date of the creditors' first meeting and of the debtor's public examination, and such other matters as it may be necessary to advertise;
  - (f) To act as trustee during any vacancy in the office.
- (2) For the purpose of his duties as an interim receiver the receiver shall have the same powers as if he were a receiver appointed by the Court in its general jurisdiction but he shall as far as practicable, consult the wishes of the creditors with respect to the management of the debtor's property, and may for that purpose if he thinks it advisable summon meetings of the persons claiming to be creditors; and he shall not unless the Court otherwise orders, incur any expense beyond what is requisite for the protection of the debtor's property or the disposing or perishable goods: Provided that when the debtor cannot himself prepare a proper statement of affairs the receiver may, subject to any prescribe conditions, and at the expense of the estate, employ some person or persons to assist in the preparation of the statement of affairs.
- (3) The receiver shall account to the Court and pay over all moneys and deal with all securities in such manner as the Court may from time to time direct.
- (4) The Court shall have the same powers over a receiver as by this Act are given to a trustee.

[25] Mr. Jairam SC argued the matter on behalf of Mr. Sands. I would reduce his arguments to the following:

1. By the operation of the enabling legislation by which the Controller was appointed, it is expressly provided that he is to be indemnified by the Estate of Bank Crozier.
2. This indemnity constitutes a first lien in favor of the Controller secured by the assets of the estate of Bank Crozier. This lien arose upon his appointment, survived the appointment of the liquidator and continues to be effective ahead of the general body of estate creditors and the liquidator, subject only to prior secured interests.
3. This indemnity interest makes the Controller a de jure secured creditor of the estate of Bank Crozier. It extends to all reasonably incurred costs and expenses associated with the exercise of the Controller's official mandate, including all legal costs necessarily incurred in the course of and in relation to this mandate.
4. The Controller's expense is that of the licensee, he is entitled to take full control over the affairs of the licensee and has the power of a receiver appointed under the Bankruptcy Act. The Offshore Banking Act contemplates that Controllers are to exercise powers analogous to those of receivers appointed under the Bankruptcy Act. In the absence of a reported case on the role of a Controller appointed pursuant to the Offshore Banking Act one is forced into a consideration of the law as it relates to trustees, receivers and similar office holders.
5. At law a receiver or a trustee of an estate is entitled to full indemnification from the assets over which is was appointed receiver for remuneration, expenses and liabilities reasonably incurred in the exercise of his duties. This indemnification constitutes a first lien against the estate under his or her administration, which ranks first in priority above the claims of the general body of creditors.

[26] Mr. Astaphan SC contended that the determination of the issue as to whether Daryl Sands as a Controller appointed under the Offshore Banking Act by the Minister of Finance is entitled to an indemnity over the assets of the company in liquidation in priority to all creditors depends on the following questions:

1. The fact that Daryl Sands was appointed by the Minister of Finance and not by the Court.
2. The powers and entitlement of a Controller appointed by the Minister under Section 20 of the Offshore Banking Act.
3. Whether or not there is a substantive difference in status, powers, rights and entitlements between a Controller appointed by the Minister under the Offshore Banking Act and a receiver appointed by the Court under the Court's general jurisdiction or provisions of different statutes.
4. Whether or not Daryl Sands is entitled to an indemnity in light of the Bankruptcy Act of Grenada.
5. Whether or not the indemnity was agreed or ought to have been agreed by the Minister and Daryl Sands prior to his appointment as Controller.
6. Whether the Court can in the absence of an agreement between the Minister and Daryl Sands impose an indemnity over all of the assets of the Company as a condition of Daryl Sands appointment as Controller under the Offshore Banking Act.

[27] Mr. Astaphan argued that Mr. Foster's primary case is that in view of the legislation of Grenada and the facts of the case, Daryl Sands is not entitled to the indemnity sought as the Controller and or former Controller or at all. The Banking Act and the Offshore Banking Act do not make any provision for an indemnity to be imposed or granted to a person appointed Controller under the Offshore Banking Act. Section 20 (1)(v) of the offshore Banking Act empowers the Minister to appoint a person "to assume control of the affairs of the company "at the expense of" the company. These words must be given their ordinary meaning and cannot be used to import the quite different and additional burden of an indemnity over all the assets of the company in liquidation to cover all alleged costs and potential costs and expenses which Mr. Sands alleges he has incurred and may sometime in the future be exposed to.

[28] Mr. Astaphan contended that as a creature of statute, the Controller is vested solely with statutory duties and powers. Further it is entirely a matter for the Minister and or the person appointed Controller to agree on the terms of

appointment. No provision was made in the letter of appointment for an indemnity either for past or future “costs, fees charges and expenses” or damages. Mr. Astaphan submitted that in light of the term of the Minister’s appointment as to” all costs, fees, charges and expenses incurred by the appointee” the Court cannot direct any further or different terms of remuneration for Mr. Sands appointment. Mr. Astaphan referred to Section 12 of the Bankruptcy Act and contended that its importance lies in the fact that primarily it is for the creditors to agree on a receiver’s remuneration. It is only in the absence of a resolution from the creditors that the Court may direct but the receiver is required to, among other things “give security.”

[29] Mr. Astaphan contended in the alternative, that which is denied, Mr. Sands is entitled to an indemnity, that indemnity is by the law of Grenada limited to the “costs, fees, charges and expenses “actually incurred by Sands personally while executing his duties and powers as Controller “for the protection of the debtors property or the disposal of perishable goods.” Mr. Sands is not entitled to any other indemnity and certainly not for “costs, fees, charges and expenses “not actually incurred by him personally or which were not prior to the appointment of the liquidator.

[30] Mr. Astaphan submitted that the person to act as Controller acts as the agent of the Minister who appoints him, not the Court, creditor or Company. The fact that public interest considerations triggered Mr. Sands appointment fully supports the contention that Mr. Sands was at all material times the agent of the Minister. Also by virtue of Section 20 (7) and (8) of the Offshore Banking Act, the minister exercises control over the controller and may terminate his appointment on receipt of a controller’s report. Therefore it is for the Minister to determine a Controller’s terms and conditions including any indemnity, not the Court.

[31] Mr. Ashley QC on behalf of the liquidator adopted all the submissions of Mr. Astaphan. Mr. Ashley argued that Mr. Sands was not a receiver. He was always under the control of the Minister and must look to the Minister for any question of indemnity.

[32] From the rival contentions of the parties, it is that an important question which fails to be considered is whether a statutory indemnity exists in Grenada. Earlier in my judgment I referred to the prevailing statutory regime. A perusal of Section 20 (1) (v) of the Offshore Banking Act shows that the Controller is

appointed at the expense of the License: to assume control over the affairs of the licensee and is empowered with like powers of the receiver appointed under the Bankruptcy Act. Does this in any way provide for an indemnity to be imposed or granted to a person appointed controller under the Offshore Banking Act? Mr. Jairam referred to Section 20 (1) (v) of the Offshore Banking Act which dictates that the appointment of a controller is made at the expense of the entity being controlled and regarded this as the statutory basis of a Controller's right of indemnity from the estate for all reasonably incurred expenses. Such a conclusion could only be arrived by putting undue an unreasonable strain on the clear language of the section. The language of the section certainly does not support Mr. Jairam. I am persuaded that the words "at the expense of" must be given their ordinary meaning and mean exactly what they say. I am in agreement with Mr. Astaphan that these words cannot be used to import the quite different and additional burden of an indemnity over all the assets of the bank to cover all alleged costs and potential costs and expenses. In my judgment there is no indemnity provided to the Controller by the Offshore Banking Act.

[33] Does the empowering of the Controller with "like powers of a receiver appointed under the Bankruptcy Act" attract or impact an indemnity. The duties of a receiver are set out in section 62, 63 and 64 of the Bankruptcy Act. The duties relate both to the conduct of the debtor and to the administration of his estate. The receiver acts as interim receiver of the debtor's estate pending the appointment of the trustee. For the purpose of his duties as an interim receiver, the receiver shall have the same powers as if he were a receiver appointed by the Court in its general jurisdictions and shall not unless the Court otherwise orders, incur any expense beyond what is requisite for the protection of the debtor's property or the disposing of perishable goods Section 64 (2) of the Bankruptcy Act. There is nothing in my reading of this Bankruptcy Act which provides for an indemnity to a person appointed controller under the Offshore Banking Act.

[34] A perusal of the relevant statutes shows that there is no statutory provision or authority in Grenada providing for an indemnity to a person appointed Controller under the Offshore Banking Act. Mr. Sands was not appointed receiver by the Court. He is a creature of statute. Being appointed by the Minister and in the absence of a statutory right to indemnity it was for the Minister and Mr. Sands to agree on the terms of appointment including remuneration and indemnity. Section 12 of the Bankruptcy Act shows that it is primarily for the creditors to agree on a receiver's remuneration. Absent a resolution from the creditors the court may direct, but the receiver is required

among other things to give security. In the instant case the minister directed that the Bank was to be responsible to settle all costs, fees, charges and expenses incurred by the Controller, Mr. Sands. There was no provision in the letter of appointment for an indemnity either for past or future costs, fees, charges and expenses or damages. I agree with Mr. Astaphan in light of the terms of the Minister's appointment as to all costs, fees, charges and expenses incurred by the appointee, the Court cannot further or different terms of remuneration. It was the Minister to determine the Controller's terms and conditions, including any indemnity, not the Court.

[35] There is a clear difference between a Court appointed receiver who is entitled to equitable protection and therefore an indemnity and a Controller/receiver appointed outside the Court e.g. by statute. It is a well established principle the "when the Court appoints a receiver, the receiver is an officer of Court, not the agent of any party in the proceedings". **In D Owen & Co. v Cronk** (1895) 1QB 256 AT 275 Rigby L J stated:

"When a receiver is appointed by the court to carry on a business he accepts the appointment on terms that he will be personally responsible to the creditors of the business while he be indemnified out of the estate."

In Kerr on the Law and Practice as to Receivers 15<sup>th</sup> edition, at page 279 it is stated:

"There are many cases which the appointment of a receiver or a ...manager is offered without resort to the Courts. Such appointments are made (i) under an agreement between persons interested in the property over which the appointment is made or (ii) under the provisions of a statute. A receiver so appointed is the agent of the parties or one of them according to the terms of the agreement or statute under which the appointment was made."

In relation to receivers appointed under statutory powers under heading "Discharge of Receiver" Kerr stated at page 308:

"A receiver is entitled to a discharge on the termination of his receivership and as a practical matter it may often be necessary for the mortgage or other appointer to give the receiver an indemnity against all claims which may be made against him arising out of the receivership."

I agree with Mr. Astaphan that the principles of law enumerated in Kerr equally apply to a controller appointer by the Minister exercising statutory power vested in him by the Offshore Banking Act. The principles apply whether or not Mr. Sands exercised

the statutory powers of a receiver, interim receiver or trustee appointed under Bankruptcy Act. Mr. Sands was not a trustee neither did he exercise any power of a trustee.

[36] It is clear that a person appointed Controller under the Offshore Banking Act, like Mr. Sands, act as the agent of the appointing Minister. This is fortified by the fact that public interest considerations triggered his appointment (see section 20 (1) of the act). Further, the Minister appointed the Controller. The Controller had to report to the Minister his observations and recommendations. The Minister could terminate his appointment on receipt of the report.

[37] Mr. Sands was not appointed receiver by the Court. As Controller, Mr. Sands enjoyed only like powers of the receiver appointed under the Bankruptcy Act. The powers were prescribed and restricted by the provisions of sections 63 and 64 of the Bankruptcy Act. A receiver appointed under statutory powers must look to the person who appointed him for an indemnity and bit to the subject company.

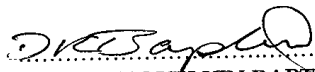
[38] Although various texts and authorities were relied on by Mr. Jairam, they concerned receivers or trustees appointed by the Court and not under statutory power. Accordingly the authorities did not in my view advance Mr. Sands case.

[39] The laws of Grenada do not make any provisions for an indemnity to be imposed or granted to a person appointed Controller under the offshore Banking Act. In the absence of a statutory entitlement to indemnity over the assets of the Bank, it was entirely a matter for Mr. Sands to seek to obtain an indemnity from the Minister. The terms and conditions of Mr. Sands appointment as Controller did not provide for an indemnity to be granted for him. There is a fundamental difference between a receiver appointed by the Court and a Controller appointed by the Minister under statutory power.

[40] In light of the statutory laws of Grenada, the difference between a receiver appointed by the Court and the Controller appointed by the parties under statutory powers and the principles of law referred to in Kerr on the Law and Practice as to Receivers, the conclusions is irresistible that Mr. Sands is not entitled to an indemnity from or over the assets of the Bank as claimed or at

all. Further, an indemnity was not part of Mr. Sands terms and conditions of appointed as Controller.

- [41] In the circumstances it is ordered that Mr. Sands application is dismissed. Taking into account the general public importance of the issue and the circumstances of the case, the Court is of the view that each party should bear their own cost and it is so ordered.

  
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**DAVIDSON KELVIN BAPTISTE**  
**HIGH COURT JUDGE**