21-03-11

IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN

CAUSE NO. FSD 0063 of 2009
(Originally Cause No. 830 of 2003)

IN THE MATTER OF the Companies Law (2010 Revision)

AND IN THE MATTER OF Parmalat Capital Finance Limited

(In Official Liquidation)

Appearances: Ms. Sandie Corbett of Walkers
for the Joint Official Liquidators

Before: Hon. Justice Henderson

Heard: March 3rd, 2011

GRAND COURT - CAYMAN ISLANDS

JUDGMENT

1. When Antonio Vierci and Ana Maria Yakisich ("the creditors") submitted a proof of debt in the liquidation of Parmalat Capital Finance Limited the Joint Official Liquidators ("the JOLs") determined that the evidence of identity was unsatisfactory. They sent several email messages to the creditors which went unanswered.

Apparently, they were intercepted by a junk email filter and quarantined. When the JOLs received no response to their request for better evidence of identity, the proof was rejected.

2. Eventually, satisfactory evidence of identity was presented and the JOLs were asked to reverse their decision. Acting upon legal advice, the JOLs have taken the position that Order 16 of the Winding Up Rules, 2008 does not allow the JOLs to reverse the rejection of a proof of debt. They advised the creditors that their only recourse was an appeal to this Court. When the appeal came on for hearing before me the JOLs agreed that it should be allowed. Accordingly, the appeal is allowed, the rejection of the proof of debt is set aside, and the revised proof of debt is admitted for dividend. Since the creditors failed to maintain proper monitoring of their own email service, they are largely the authors of their own misfortune and are not entitled to their costs.

3. In the hope of assisting liquidators who may in the future perceive a similar difficulty, I provide these comments on the terms of Order 16.

4. When an official liquidator is adjudicating upon the claim of a creditor, he is acting in a quasi-judicial capacity: Order 16, rule 1 (4), Winding Up Rules, 2008 ("the Rules").

5. A creditor has the right "at any time" to withdraw or vary his proof of debt by agreement with the liquidator. The applicable provision is Order 16, rule 5 (1) which reads:

> "A creditor's proof may at any time, by agreement between himself and the liquidator, be withdrawn or varied as to the amount claimed."

6. The right to an appeal by a dissatisfied creditor is provided for expressly in Order 16, rule 17 (1) which reads:

> "if a creditor is dissatisfied with the official liquidator's decision with respect to his proof (including any decision on the question of priority), he may appeal to the Court for the decision to be reversed or varied."

The word "Court" here means the Grand Court of the Cayman Islands. Order 16, rule 6 (3) requires an official liquidator who is rejecting a proof of debt to advise the creditor of his right to appeal. Order 16, rule 18 (5) confirms that the appeal shall be dealt with as a *de novo* adjudication of the creditor's proof of debt and additional evidence may be considered. There are also provisions (in Order 16,

rule 20 and 21) giving the Court jurisdiction to expunge a proof of debt which has been admitted. Nothing in the Rules refers to a possible reconsideration by a liquidator of his previous rejection of a proof of debt. The question I have been asked to consider is whether such a reconsideration is permitted.

7. It is not uncommon for decision makers, including judges, to reconsider a decision upon the basis of fresh evidence or argument and vary the terms of a decision previously made. The fact that the JOLs act in a quasi-judicial capacity when adjudicating upon a proof of debt does not by itself suggest that any reconsideration of the decision later on is not permitted. In the absence of language in the Rules which makes such a reconsideration impermissible, JOLs must be taken to have the same flexibility to reconsider decisions, take into account new evidence and fresh arguments, and rectify mistakes as is possessed by any other judicial, quasi-judicial or administrative decision-maker. An appeal to the Grand Court is a relatively expensive requirement for the rectification of a simple breakdown in communication of the sort which occurred here. I would not hold that an official liquidator is prohibited from reconsidering a decision

unless compelled to do so by express language in the Rules. The Rules contain no such language.

8. The Rules tend to support the view that a reconsideration of the decision is possible. Rule 5 (1) provides that a creditor's proof of debt may be withdrawn or varied by agreement with the liquidator "at any time". I see no reason why that proof of debt may not be withdrawn (with the liquidator's agreement) after it has been adjudicated upon and rejected. Once withdrawn, the creditor is then free to submit a fresh proof of debt containing new evidence or argument which the liquidator may then rule upon. In effect, a liquidator has the power to reconsider an adjudication if he considers that is the fair and reasonable thing to do.

9. When determining whether it is fair and reasonable to reconsider an adjudication, a liquidator must have regard to the rights of third parties. If any third party may be prejudiced by the reconsideration in the sense that he has relied to his detriment on the fact of the rejection, the liquidator should give notice of the prospective reconsideration to that party. If the third party objects to the reconsideration and demonstrates that he is likely to be prejudiced by

a reversal of the decision, the liquidator should not reconsider his decision but should leave the creditor to pursue his right of appeal accorded to him by the Rules. Subject to this consideration of the position of affected third parties, a liquidator is free to reconsider a decision to reject a proof of debt.

Dated this 21st day of March, 2011

Henderson, J.

Henderson, J.
Judge of the Grand Court