IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO. FSD 27 of 2015 (ASCJ)

IN THE MATTER OF THE COMPANIES ACT (2022 REVISION)

AND IN THE MATTER OF CALEDONIAN BANK LIMITED (IN OFFICIAL LIQUIDATION)

HEARD ON THE PAPERS

Appearances:	**Mr. Rupert Bell of Walkers for the Liquidators**
Before:	**Hon. Justice Sir Anthony Smellie**
Heard:	**18th September 2022**
Judgment:	**9th March 2023**

HEADNOTE

Liquidators' application for redistribution of unclaimed funds in context of liquidation of banking company-whether the liquidators have power to redistribute funds related to deposits automatically admitted to proof-whether Court has jurisdiction to authorize liquidators to do so-unclaimed funds to be disposed of in keeping with the Companies Act and Company Winding Up Rules.

RULING

1. The Joint Official Liquidators ("**JOLs**") of Caledonian Bank Limited ("**CBL**" or "**the Bank**") seek relief relating to the calculation and determination of who is eligible to receive the final dividend in the liquidation of CBL.

2. This Application is prompted by the fact that a number of depositors of CBL have remained disengaged from the liquidation process, although as depositors with the Bank and as such have automatically been admitted to proof as creditors to the extent of their deposits, they have failed to respond to the JOLs' efforts to contact them. They are hereinafter referred to as "**the Disengaged Depositors**".

3. The result is that the JOLs have identified a number of relevant claims, (the "**Relevant Claims**") and an unclaimed fund of USD$1,776,816.16 related to the Relevant Claims for which they now seek the approval of the Court to be released for distribution to other proven creditors of depositors of CBL.

4. The difficulty facing the JOLs' proposition is that by operation of CWR Order 16, rules 7 (2) and (3), there is no question but that the Disengaged Depositors are to be and have properly been automatically admitted to proof as creditors of CBL by reference to the respective amounts of their deposits.

5. Order 16, rules (2) and (3) of the CWR provide uniquely for the admission of claims in the liquidation of a bank without a creditor being required to submit a proof of debt, as follows:-

> *"(2) All of its company's depositors to whom periodic statements of accounts were sent by the company shall be admitted to proof in respect of the amounts recorded due to them without requiring them to lodge proofs of debt unless the official liquidator has reason to believe that the company's deposit taking records are unreliable.*
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> *(3) Where the official liquidator has admitted a depositor to proof without requiring him to submit a proof of debt, he shall send notice in CWR Form No. 27 informing the depositor of this fact."*

6. The JOLs have found no basis for regarding CBL's deposit taking record as unreliable. On the contrary, it is on the basis of their acceptance of their reliability that the liquidation has proceeded by admitting depositors as creditors to proof without requiring them to submit proofs of debt.

7. Indeed, pursuant to Order 16, rule 7 (3), the JOLs issued notices in CWR Form No. 27 to all depositors of CBL, admitting their claims in the liquidation after being satisfied that CBL's deposit taking records were not unreliable.

8. It follows, that in order to redistribute the Unclaimed Funds to other depositors or creditors, the JOLs must identify a basis upon which the Disengaged Depositors may be treated as disentitled to the Unclaimed Funds.

9. The JOLs submit that it is open to this Court to allow the JOLs to reconsider their admission of the Relevant Claims and rely in this regard on dicta from the case of *In Re Parmalat Capital Finance Limited,* 2011 (1) CILR 113 to the effect that a liquidator has the power to reconsider a decision. This was in the context of the liquidators in that case wanting to admit a proof of debt that had previously been rejected for lack of evidence.

10. In *Re Parmalat*, Henderson J noted in his judgment that:-

> *"In the absence of language in the CWR 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."*

11. While the general force and logic of that dictum is undeniable, there are obvious obstacles to its application to the present case.

12. First, there are here present none of the factors contemplated by Henderson J as possibly justifying a reconsideration.

13. Here no new evidence or fresh arguments arise to bring into question the correctness of Relevant Claims having been admitted to proof.

14. Along with all the depositors of CBL, Disengaged Depositors were automatically admitted to proof for the respective amounts of the Relevant Claims once the JOLs were satisfied that the deposit taking records of CBL were not unreliable. There is no new evidence to suggest otherwise and there are no mistakes which could give rise to any argument for rectification of the records or otherwise of the process of admission of debts to proof.

15. In other words, there simply is no factual basis for a reconsideration of the Relevant Claims by the JOLs.

16. Also worthy of note, in their written submissions the JOLs admit that "*the failure to engage or engage meaningfully (in the liquidation process) does not appear to be an express exception provided for in the CWR that would permit the adjudication of the Relevant Claims to be treated differently*".

17. This concession is to my mind all the more telling in light of the importance to be ascribed to the grounds recognised by the CWR upon which a liquidator can apply to the Court to expunge a proof of debt which has been admitted. There are only two such grounds pursuant to Order 16, rule 20 (2) of the CWR as follows:-

> "(a) that it ought not to have been admitted; or
>
> (b) that it ought to have been admitted for a lesser amount."

18. From this it must be recognized that a liquidator has no authority to expunge an admitted proof of debt of his own volition acting on notions of "fairness" to other creditors, which is tantamount to how the argument is presented here as a basis for the Court's approval of the proposition. Nor is there any suggestion that the Court might itself so direct in exercise of any unwritten inherent jurisdiction or discretion.

19. Of course the circumstances under which the two grounds of sub-rule (a) and (b) may become applicable are legion, but they must be identifiable. To my mind a mere wish to redistribute entitlements of dividends attributable to proofs of debt which have been properly admitted would not by such a circumstance. It simply cannot be said that that consideration would mean

that the debts ought not to have been admitted or that they should have been admitted for a lesser amount.

20. At base it seems to me that the real concern underpinning the JOLs' application is that as the Disengaged Depositors were not required specifically to prove their debts and have not sought to recover them, the Unclaimed Funds should be available to meet the claims of the other depositors who are to recover less than 100% (actually 91.2%), of their deposits in the context of what has turned out to be an insolvent liquidation of CBL. That proposition would be put forward by analogy with a non-bank insolvency in which creditors must prove their debts and rank pari passu.

21. Further, that Order 16 rule, 7 of the CWR although expressed in mandatory in terms, could not have been intended to result in the continued provision for depositors who refuse or fail to participate properly in the liquidation to the detriment of the creditors who do. That would be contrary, say the JOLs, to how assets are distributed in any other liquidation.

22. The JOLs argue that an analogy can be drawn with the case of *In re Consistent Return Limited 2012* (1) CILR 445 which concerned an application seeking that the voluntary liquidation of that company be brought under the supervision of the Court such that the liquidators could take advantage of the statutory proving process prescribed for an official liquidation.

23. There, is the context of what was to have been by all accounts, a solvent liquidation, a question facing the liquidators, was what was to be done about creditors who were unwilling to submit a proof of debt. Jones J did not see the need to bring the voluntary liquidation then more than three years old, under the supervision of the Court in order that question but directed instead that while they could not compel unwilling to submit proofs of debts, the liquidators could protect themselves from possible adverse claims by putting any disputed creditor on notice and they must issue a writ, failing which, the company's assets could be distributed without regard to their interests.

24. I do not regard that approach, taken no doubt appropriately in the context of *In re Consistent Return Limited,* as properly by analogy to be taken here.

25. The obvious reason is that here there are no "disputed debts". Unwillingly though the Disengaged Depositors may be to pursue their claims, there is no doubt that the Unclaimed

Fund belongs to them properly identified in the amounts related to Relevant Claims which have been properly admitted in this, the context of the liquidation of a bank.

26. Moreover, and as the JOLs recognise in their written submissions, there are sound and historical policy reasons behind Order 16, rule 7(2) of the CWR which, I repeat, in mandatory terms provides that admission to proof without submission of proof of debt will occur unless the official liquidator has reason to believe that the company's deposit taking records are unreliable.

27. *In re Inco Bank and Trust Corporation* 1994-95 CILR 99 at 104, this Court, before the introduction of the CWR, faced with a situation where a creditor who had not been directly contacted by the liquidators and had not submitted a formal proof of debt, would not be found to be a creditor for the purposes of benefitting from funds held on trust by Inco Bank (In Voluntary Liquidation) noted that "*as a general principle of practice I would regard the strict application of the 1949 (Insolvency) Rules, to the detriment of a depositor of a bank who may not be immediately aware of the liquidation and who may therefore not file a claim, to be wholly unsatisfactory and inappropriate. It seems necessary that any local. winding up or insolvency rules should make special provisions for the protection of depositors in the case of a voluntary liquidation of a banking company*" (emphasis added)

28. Although introduced more than a decade later, it would appear therefore that the rationale behind the implementation of Order 16 rule, 7 of the CWR, in the particular context of the liquidation of a banking company in the Cayman Islands, is to ensure that bank depositors are automatically admitted to proof because they may not, despite best efforts on the part of liquidators, become aware immediately of the liquidation of the bank in which they hold a deposit or deposits.

29. There is also clearly a cost-saving benefit to the liquidation estate in the application of Order 16, rule 7, given the likely large numbers of depositors and the time and effort that would need to be spent by the liquidator in reviewing and deciding upon proofs of debts, to be avoided when the bank's records, in the usual course of business, will provide a clear and immediate indication of the debts owed to depositors.

30. The circumstances of the current liquidation of CBL are different from those of Inco Bank which occurred more than two decades ago and before easy and direct communication by the

internet became commonplace. Nowadays, depositors might be expected to monitor the affairs of their bank over the internet so that notice of a major event such as a liquidation might be obtained, as indeed has notice of this liquidation been given by the JOLs by publication on a dedicated website. Nonetheless, the policy reasons behind Order 16, rule 7 in my view remain quite valid such that its mandatory terms must be respected and the mere fact that the JOLs and other depositors who would benefit are in favour of a redistribution of the Unclaimed Funds, is no basis for disapplying the rule, as would in effect occur, if I granted the Application.

31. It is true, as the JOLs submit, that in the typical liquidation not involving a banking company, creditor claims are only admitted upon submission of a proof of debt and those who disengage from the process will not be regarded as creditors but will have their assets form part of the assets of the liquidation to be distributed to admitted creditors on the pari passu basis. But that does not change the fact that there are the good policy reasons for the existence of Order 16, rule 7 and for its application to the liquidation of CBL.

32. What then is to become of the Unclaimed Funds? The answer which is also prescribed by sections 152 and 153 of the Act and Order 23 of the CWR, is settled and well known as a matter of Cayman Islands law and practice. Accordingly, it must be presumed to be understood by the Disengaged Depositors who may have good reasons - such as tax implications - for wishing not to claim in the liquidation and for remaining disengaged.

33. It follows that if the liquidation were to conclude without dividends being paid to the Disengaged Depositors, the sum of USD$1,776,816.16 plus the value of the final dividend will remain in the liquidation estate and fall for treatment as follows:-

(a) The Unclaimed Funds would be held by the JOLs (as trustee) in a bank account on trust for the benefit of the Disengaged Depositors. The JOLs would advertise the existence of the Unclaimed Funds and administer payment to the Disengaged Depositors to the extent they come forward; and

(b) At the end of one year after the dissolution of CBL, the JOLs will transfer any remaining Unclaimed Funds to the Minister of Finance who in keeping with CWR Order 23, rule 6, would be responsible for administering the same pursuant to Part VIII of the Public Management and Finance Act. A

Disengaged Depositor would subsequently be able to make a claim to the Minister of Finance for its, his or her share of the Unclaimed Funds. Any amounts not so claimed and paid would ultimately go bona vacantia to the Crown.

34. See, for a recent example of a similar operation of the provisions of the Act and CWR: *In the matter of F & C Warrior Fund Limited* (Dissolved) FSD 105 and 107 of 2021 (ASCJ), written judgment delivered on 25th May 2021.

35. For all the foregoing reasons, the JOLs' application seeking authority to take steps to implement and perform the "Unclaimed Funds Procedure" as defined in the 20th Affidavit of Keiran Hutchinson and by which the Unclaimed Funds would be distributed to the general body of depositors of CBL so as to raise their rate of dividends from 91.2% to 91.6%, is refused.

36. While this ruling was drafted as long ago as 18th September 2022, it was for administrative reasons not finalized for publication until now. It is accordingly now made available with the apologies of the Court for the delay.

Honourable Sir Anthony Smellie
Judge of the Grand Court (Pro Tem)
9th March 2023