TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV2006-02529

IN THE MATTER OF
GOODWILL GENERAL
INSURANCE COMPANY LIMITED
(IN LIQUIDATION)

AND

IN THE MATTER OF
THE INSURANCE ACT,
CHAPTER 84:01

AND

IN THE MATTER OF
THE COMPANIES ACT
CHAPTER 81:01

AND

IN THE MATTER OF
SECTION 447 OF THE
THE COMPANIES ACT,
CHAPTER 81:01

BETWEEN

CENTRAL BANK OF TRINIDAD AND TOBAGO
(a body corporate established by Section 3 of

The Central Bank Act, Chapter 79:02)

Claimant

AND

GOODWILL GENERAL INSURANCE COMPANY LIMITED (IN LIQUIDATION)

Defendant

AND

(1) WILBERT HILTON WINCHESTER
(2) ALBERT TOM YEW
(3) JOHN LINDSAY GILLETTE
(4) HAROLD RUSSELL
(5) RICHARD FIELDS
(6) LENNARD WOODLEY
(7) PATRICK EUSTACE TAYLOR
(8) RICARDO ST. CYR
(9) JOHANN LAMBKIN

BEFORE THE HONOURABLE MR. JUSTICE PETER A. RAJKUMAR

APPEARANCES:

Mr. Neil Bisnath and Mr. S. Sharma instructed by Ms. Mendonca for the Liquidator.
Mr. Alvin Fitzpatrick S.C. and Mr. Bronock Reid instructed by Ms. Pryia Chankadyal for 2nd Respondent
Mr. Avory Sinanan S.C., Ms. Linda H. Rajpaul instructed by Mr. Hewitt for 3rd, 4th and 5th Respondents
Mr. Stanley Marcus SC, Mr. Jerome Herrera instructed by Ms. Karen E. Piper, Janelle Farrell for Mr. Patrick Taylor for 7th Respondent.
Mr. James Aboud instructed by Ms. N. D. Alfonso for 8th Respondent.
Mr. Singh - Central Bank.
Mr. Johann Lambkin 9th Respondent in person representing himself and the 6th Respondent**.**

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Judgment

The Application

This application is instituted by the court appointed liquidator of Goodwill Insurance Company Limited (Goodwill) pursuant to Section 447 of the Companies Act Chapter 81.01 seeking inter alia,

(a) recovery from former directors of Goodwill of the sum of $21,563,430.00, the amount of Goodwill's outstanding insurance debts and liabilities or such part thereof as the court may adjudge, and

(b) declarations that the named past directors were jointly and severally, knowingly parties to the carrying on of the business of the company contrary to S.447 (1) of the Companies Act, that is, with intent to defraud creditors of the company or the creditors of any other person or for any fraudulent purpose, or with reckless disregard of the company's obligation to pay its debts and liabilities; or with reckless disregard of the insufficiency of the company's assets, to satisfy its debts and liabilities.

Chronology

The chronology of events preceding the instant application is as follows:

(i) Goodwill was incorporated on 29th January 1971 as an insurance company which was involved in underwriting motor insurance business and subsequently life and non life insurance.

(ii) In February 1992 Goodwill's entire shareholding was sold to Demerara Life Assurance Company of Trinidad and Tobago Limited (Demerara).

(iii) Goodwill ceased underwriting life insurance in February 1992.

(iv) Mr. Bertrand Doyle was Chairman of Goodwill from January 2nd 1992 to April 18th 1997. He was also Chairman of Demerara at that time.

(v) From January 1st 1994 Goodwill ceased underwriting property insurance.

(vi) In 1996 Goodwill transferred its life insurance portfolio to Demerara.

(vii) In 1998 Goodwill sold its head office to Demerara for $6M.

(viii) Mega Insurance owned Demerara and Albert Tom Yew and John Lindsay Gillette were appointed as directors of Goodwill to represent Mega's interests. (Each is hereinafter individually referred to as Tom Yew, or Gillette, respectively).

(ix) Harold Russell and Richard Fields were directors prior to that and remained on the Board of Goodwill until its sale in 1999. (Each is hereinafter individually referred to as Russell or Fields respectively).

(x) Tom Yew is still Managing Director of Mega.

(ix) Demerara Insurance owned Goodwill up to December 1999 when Goodwill was sold to a group of investors - Lennard

Woodley, Johaan Lambkin, Ricardo St. Cyr and Patrick Taylor. (hereinafter individually referred to as Woodley, Lambkin, St. Cyr or Taylor respectively)

(x) Woodley, Lambkin, St. Cyr and Taylor, [hereafter referred to as the Second Group of Directors] were appointed directors after that sale.

(xi) A Judicial Manager was appointed by the Court on September 29th 2006.

(xii) On January 8th 2007 it was ordered inter alia:

(a) that Goodwill be wound up by the Court under the provisions of the Companies Act Ch 81:01 and the Insurance Act 84:01,

(b) that Mr. Victor Herde be appointed liquidator of Goodwill.

The liquidator submitted two interim reports to the Court and subsequently on the 7th March 2008 he made an application to the Court to affix the respondents with personal liability for the debts of Goodwill.

The Directors

The directors fall into 2 broad categories - those who were directors before the sale of Goodwill by Demerara and those who were directors after that sale. It was not disputed that a director could not be held responsible for matters that arose before he became a director. It is therefore necessary to set out the period of tenure of each director.

Prior to its sale the directors of Goodwill were Lindsay Gillette, Harold Russell, Richard Fields, and Albert Tom Yew, though Fields and Russell claim to have resigned with effect from December 14th 1999. These are hereafter referred to as the First Group of Directors.

Harold Russell, Bertrand Doyle and Richard Fields were appointed Directors of the Company on the 2nd January 1992. By filed Notice of Change of Directors dated 28th December 1999, they ceased to be directors on 29th December 1999.

Tom Yew and Gillette were directors from the period April 18 1997 and resigned with effect from December 29 1999 according to returns filed in the companies registry, though Gillette claims to have resigned with effect from October 1999.

St Cyr was a director from December 29th 1999 until January 2001 though he is not recorded as having ceased to be a director until 2002.

Taylor was a director from December 29th 1999 until July 2000 though he is not recorded as having ceased to be a director until 2006.

Lambkin and Woodley were Directors from December 29th 1999 until the appointment of the Judicial Manager.

Disposition

I find as follows:

1. That the Liquidator was entitled to investigate the affairs of Goodwill, and that he had the sanction of the court to do so.
2. The evidence is not sufficient to establish that the first group of directors knowingly carried on the business of Goodwill with reckless disregard of the insufficiency of the company's assets to satisfy its debts and liabilities and the company's obligation to pay its debts and liabilities pursuant to Section 447(1) (b) and (c).
3. The evidence is insufficient to establish that St Cyr knowingly carried on the business of Goodwill with reckless disregard of the insufficiency of the company's assets to satisfy its debts and liabilities and the company's obligation to pay its debts and liabilities pursuant Section 447(1) (b) and (c) or with intent to defraud creditors.
4. The evidence is insufficient to establish that Taylor knowingly carried on the business of Goodwill with reckless disregard of the insufficiency of the company's assets to satisfy its debts and liabilities and the company's obligation to pay its debts and liabilities pursuant to Section 447(1) (b) and (c) or with intent to defraud creditors pursuant to S447 (1) (a) of the Companies Act.
5. The evidence establishes that Woodley and Taylor knowingly carried on the business of Goodwill with reckless disregard of the insufficiency of the company's assets to satisfy its debts and liabilities and the company's obligation to pay its debts and liabilities pursuant to Section 447(1) (b) and (c).

6. The evidence is sufficient to establish that Woodley knowingly carried on the business of Goodwill with intent to defraud creditors pursuant to s 447(1) (a) of the Companies Act.
7. Goodwill had been insolvent since 1996. In the course of its management until the intervention of the Judicial Manager in 2006 several events occurred, each of which conceivably could have impacted on that solvency position and which required investigation. For example under the tenure of the first group of directors the following occurred - the disposition of the more profitable aspects of Goodwill's business – life and property insurance, the disposition of real property assets associated with its life portfolio, the sale of its headquarters at Abercromby Street, and the possibility that the sale of the latter to its parent company was at an undervalue.
8. During the tenure of Taylor a company called Goodwill Premium Financing was formed which earned income by apparently financing Goodwill's premiums. This company was formed and controlled by Taylor for his personal profit until control was wrested from him by Woodley. In addition there are allegations against him by fellow directors relating to invoices submitted to the company and unaccounted income.
9. With respect to St Cyr his involvement in the company was revealed to have been minimal, having been excluded from the management of the company and having suffered ill health for a significant period of his tenure. In addition St. Cyr's account of his involvement was corroborated by his fellow directors in the course of this investigation.

10. Though I find that the elements of s.447 in relation to the first group of directors as well as Taylor and St. Cyr were not established, I take into account that during the directorship of each the Company was insolvent since 1996 under the test established under the Insurance Act. In those circumstances, having been satisfied that there was prima facie material in relation to each of these directors that required further investigation I am not inclined in the exercise of my discretion to require the costs of that necessary investigation into these matters to be borne by the Liquidator. Accordingly I make no order as to costs in relation to these respondents.

11. I am prepared to give Lambkin the benefit of the doubt that he knowingly carried on the business with the intent to defraud creditors of Goodwill within the meaning of Section 447(1) (a) by continuing to disclose ownership of a parcel of property in Cascade in Goodwill's Financial Statements and Act Accounts for the years 2001, 2002 and 2003 when Goodwill had already sold the said property.

12. I find that Woodley knowingly carried on the business with the intent to defraud creditors of Goodwill within the meaning of Section 447(1) (a) by attempting to disclose ownership of a fictitious property in Goodwill's Financial Statements and Act Accounts for the years 2000, 2001, 2002, 2003 and 2004.

13. I find Lambkin and Woodley knowingly carried on the business of Goodwill between September 2000 and September 2006 with reckless disregard of the insufficiency of the company's assets to satisfy its debts and liabilities and the company's obligation to pay its debts and liabilities pursuant to Section 447(1), (b) and / or (c) .

14. I find that Lambkin and Woodley are jointly and severally liable for the sum of $20,000,000.00 in respect of Goodwill's outstanding insurance debts and liabilities (out of the sum of $23,590,738.39 being the debts and liabilities of Goodwill) incurred by reason of their conduct.
15. .I order that Lambkin not be a director in or be directly or indirectly involved in the management of a company incorporated in Trinidad and Tobago, without leave of the Court, for a period of five years from the date of this order.
16. **I** order that Woodley not be a director in or be directly or indirectly involved in the management of a company incorporated in Trinidad and Tobago, without leave of the Court, for a period of five years from the date of this order.
17. I order that Lambkin and Woodley do pay to the liquidator his costs of bringing this application certified fit for two counsel.
18. I order further that there be liberty to apply.

Preliminary Issues - Jurisdiction

I note that it is alleged that the action is statute barred against the First Group of Directors, that it is also barred by laches, and that in so far as claims are made for recovery against these directors without former director Doyle, or the estate of former director Winchester, being joined, any contribution they may be required to make would be unfairly increased as there would be fewer parties to share the burden. It is also submitted that liability under s.447, by analogy with interpretation of equivalent provisions in the U.K. must primarily be several liability, rather than joint and several, though the court has the discretion to consider joint and several liability if the

circumstances so indicate. I deal with these issues further in the course of this judgement but I find they do not detract from the necessity of the investigation of the conduct of each director.

A preliminary point was taken on behalf of many of the respondents including Mr. St Cyr that the liquidator had no jurisdiction to bring this action - He required the sanction of the court under S.376 (1) of the Companies Act Ch 81.01 to bring or defend any action or other legal proceeding in the name of and on behalf of the company. It was claimed that he had not obtained such sanction and as such he was without jurisdiction on a frolic of his own.

In addition s.81 (1) of the Insurance Act was a more specific provision which applied to Insurance companies and which should have been utilised or applied rather than s.447 (1) of Companies Act. Similarly s.398 of the Companies Act would have been a fairer procedure as it could have produced more information in relation to a greater number of parties who may have shared culpability. Finally s.78 of the Insurance Act was applicable and it expressly stipulated that the liquidator should act under the control of the court and may apply for instructions as to the matter in which he shall conduct the winding up.

Section 81(1) Insurance Act Chap. 84:01 reads as follows:

> *"Where in the course of the winding up of a company, the Court is satisfied that the amount of* **a statutory fund** *has been diminished by reason of any*

contravention of the provisions of this Act, every person who at the time of the contravention was a director, the principal representative or an officer of the company, shall be deemed in respect of the contravention to have been guilty of misfeasance unless he proves that the contravention occurred without his knowledge and that he used all due diligence to prevent the occurrence thereof."

Companies Act s.376 (1) (a) states as follows:

"The Liquidator in a winding up by the Court may **with the sanction** *either* **of the Court or** *of the committee of inspection –*

(a) bring or defend any action or other legal proceeding in the name and on behalf of the company;"

This application is by the liquidator. It is not on its face one which is in the name of and on behalf of the company. Even if it is in effect on behalf of the company and requires the sanction of the court, however, the very nature of the application under s.447 (1) has built into it the necessity for the sanction of the court and its supervision and control of the process.

This is demonstrated by the procedure stipulated in the winding up rules 53 (1) and (2) which apply to s.447 (1) (2) or (4A) applications.

The Companies Winding Up Rules, Chap. 81:01 provide as follows **-**

"53. (1) An application made to the Court under any of the following provisions of the Act:

(a) section 448;

(b) subsection (1), (2) or (4A) of section 447;

(c) section 399A;

(d) subsection (2) of section 523,

shall be made by a summons returnable in the first instance in Chambers. The summons shall state the nature of the declaration or order for which application is made, and the grounds of the application, and, unless otherwise ordered, shall be served in the manner in which an originating summons is required by the Rules of the Supreme Court to be served, on every person against whom an order is sought, not less than eight days before the day named in the summons for hearing the application. Where any such application is made by summons no affidavit or report shall be filed before the return of the summons.

(2) On the return of the summons, the Court may give such directions as it shall think fit as to whether points of claim and defence are to be delivered, as to the taking of evidence wholly or in part by affidavit or orally, and the cross examination either before the Judge on the hearing in Court or in Chambers of any deponents to affidavits in support of or in opposition to the application and as to any report it may require the Official Receiver or Liquidator to make and generally as to the procedure on the summons and for the hearing thereof."

(emphasis mine)

A Summons must therefore be filed without an affidavit in support and on the returnable date of the summons the court gives directions. The further conduct of such an application including the taking of evidence, the reports of the liquidator and the procedure generally is therefore subject to the sanction and supervision of the court.

I am therefore unable to accept that the liquidator did not have the sanction of the court or that the liquidator had no jurisdiction to institute this application. In fact, substance, and reality, I find that the liquidator did have the court's sanction.

It is an essential part of his powers pursuant to a winding up ordered by the court that a court appointed liquidator should be able to investigate the affairs of the company and pursue recovery if possible of any shortfall in its assets if he is of the view there is evidence of wrongdoing . The type of wrongdoing that he must be satisfied of is set out in s. 447 of the Companies act - namely carrying on business of the company with intent to defraud creditors or reckless disregard of the company's obligations to pay debts and liabilities or reckless disregard of the insufficiency of the company's assets to satisfy its debts and liabilities.

He cannot embark on an application like the instant one unless he is satisfied that a prima facie case exists that there is material to justify an application to declare that officers of the company were knowingly parties to the carrying on of the business in the prohibited manner.

In the instant case:

(a) the liquidator had reported to the court by his affidavit filed on September 26th 2007 of his intention to make an application to the High Court for the directors to be held personally liable for the company's outstanding debts and to rely inter alia on S.447 of the Companies Act,

(b) his report revealed that Goodwill had been insolvent since 1996 to a greater or lesser extent,

(c) the respondents were directors of the company over the material period of its insolvency, and

(d) Goodwill - a company offering motor vehicle insurance - which was compulsory under the Motor Vehicles Insurance Third Party Risks Act Ch 48.50 - was deemed unable to pay its debts, including all outstanding claims.

It is not disputable that the purpose of this Act is the protection of users of roadways in Trinidad and Tobago. The act itself is intituled "An act to make provision for the protection of third parties against risks arising out of the use of motor vehicles."

All owners of using motor vehicles on public roads are required to have motor vehicle insurance **[See Ch. 48.51 s.3] ,** up to specified limits In respect of death or bodily injury - currently $2 million in respect of total claims per accident and $1 million per person per accident. In respect of damage to property, $1 million per accident in total and $500,000 per person.

Having such coverage in place is some consolation to road users who suffer property damage and personal injury. Having an insurance policy in place which is unable to or does not respond in the event of loss can be financially devastating, particularly in the case of serious personal injury. If a company like Goodwill were continuing to accept premiums and offer policies but it was unable to pay its liabilities - particularly claims and judgments- this would obviously be unacceptable.

Clearly this was a situation that prima facie required explanation as to how this state of affairs, having begun, could be allowed to continue for (10) years. The persons prima facie capable of providing the explanations and who were most likely to be responsible were the directors .If there was an opportunity to recover from persons responsible then **s**.447 provides one element of the statutory framework for the protection of creditors and policy holders. I consider it of little relevance that other provisions of the Companies Act or Insurance Act could have been invoked.

I find that the liquidator satisfied his responsibilities to the court by reporting, on September 20th 2007 and obtaining directions from the court for the pursuit of the instant proceedings. It would have been open to any of the respondents to indicate to the court, at the time the liquidator instituted the application by filing the summons, that they required an opportunity to submit that the liquidator's report did not reveal any grounds for proceeding against them, or that they did not wish to file affidavits as the liquidator had failed to obtain the court's sanction. This was not done.

Though I consider it would not be necessary in light of my finding that the liquidator had the effective sanction of the court to institute these proceedings, I would have been prepared to grant such sanction retroactively as I consider this would be an appropriate case where the liquidator, in light of his findings had a duty to institute such proceedings once he informed the court of his intention to do so, as he did.

I find that Rule ***192 Companies Winding Up Rules*** is also applicable. The rule states as follows:

> *"192. (1) No proceedings under the Act of the rules shall be invalidated by any formal defect or by any irregularity, unless the Court before which an objection is made to the proceeding is of opinion that substantial injustice has been caused by the defect or irregularity, and that the injustice cannot be remedied by an order of that Court.*
>
> *(2) No defect or irregularity in the appointment or election of the Official Receiver, Liquidator, or member of a Committee of Inspection shall vitiate any act done by him in good faith."*

I find no irregularity occurred. Even if it had, I find no substantial injustice has been caused. If the respondents had contended at an earlier stage that the court should have made an order formally specifying that it had granted its sanction this matter could have been readily addressed when the summons first came up before the Honourable Justice Bereaux.

The costs of this preliminary issue would in the normal course have been payable to the liquidator by the respondents, save for Lambkin and Woodley, subject to my findings below.

Limitation

The First group of Directors submit that this application filed on the 7th March 2008 against them is statute- barred**.**

Section 3 (1) (c) of the Limitation of Certain Actions Act Ch: 7.09 provides:-

> *"The following actions shall not be brought after the expiry of four years from the date on which the cause of the action accrued, that is to say:-*
>
> *(c) actions to recover any sum recoverable by virtue of any enactment".*

The basis of the Liquidator's jurisdiction to bring this application is statutory, being based on Section 447 (1) Companies Act and the application seeks recovery based on matters occurring during the directorships of the First group of Directors during the period –1996 – 1999.

It was contended that more than four years would have elapsed since the cause of action would have accrued and in the circumstances these Respondents would be entitled to rely on the expiration of the Limitation period.

In **Re Farmizer (Products) Limited [1997] 1 BCLC 589**, on interlocutory appeal, the Court of Appeal held the Judge below was correct in holding that an application of that nature (a Section 214 "wrongful trading" application) must be commenced within six years (the equivalent limitation in the UK) from the company going into liquidation.

Here the winding up order was made on the 8th January 2007. Accordingly the instant section 447 application would not be not statute-barred.

LACHES

The First Group of Directors further submit that it is the policy of the law to discourage stale claims and they are entitled to plead and rely on the doctrine of laches as a complete defence.

In **ERLANGER AND THE NEW SOMBRERO PHOSPHATE COMPANY AND OTHERS [1873] 2 App Cas. 1218**. At pgs.1279-1280 Lord Blackburn explained -

> "*In Lindsay Petroleum Company v. Hurd (1), it is said: "The doctrine of laches in Courts of Equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct done that which might fairly be regarded as equivalent to a waiver of it, or where, by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases lapse of time and delay are most material. But in every case if an argument against relief***, which**

otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that defence must be tried upon principles substantially equitable. *Two circumstances always important in such cases are the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy." I have looked in vain for any authority which gives a more distinct and definite rule than this; and I think, from the nature of the inquiry,* **it must always be a question** *of more or less, depending on the degree of diligence which might reasonably be required, and the degree of change, which has occurred***, whether the balance of justice or injustice is in favour of granting the remedy or withholding it. The determination of such a question must largely depend on the turn of mind of those who have to decide,** *and must therefore be subject to uncertainty; but that, I think, is inherent in the nature of the inquiry." (emphasis mine)*

The position is restated in the case of **FRAWLEY v NEIL 5th April 1999 Times Law Reports**

"The modern approach to the equitable doctrine of laches, whereby the court would not uphold beneficial rights whose assertion or enforcement had been unreasonably delayed by their claimant, was not to inquire into all the circumstances to see whether they fitted within the principles established in previous cases, but **rather to ask whether, broadly considered, the claimant's**

actions were such as to render it unconscionable for him to be permitted to assert his beneficial rights." *[Emphasis Added]*

The first group of directors demitted office in 1999 when the Company was sold. These proceedings were instituted on the 7th March 2008 - a period of eight and a half years elapsed.

I do not consider that laches arises here as a complete defence for the reasons set out hereunder, namely that:

(i) the actions of the first group of directors required explanation,

(ii) that laches is an equitable defence,

(iii) the Directors Gillette and Tom Yew were still in a position to assist the court and to respond to the application by production of documents despite the lapse of time, apparently through their continuing association with Mega insurance

(iv) that it was always open to the court to assess the evidence and consider the effect of delay in relation to the weight of specific evidence

(v). that the actions of the liquidator, who was assisting the regulator and the court, were not in the circumstances such as to render it unconscionable for him to be permitted to institute these proceedings.

The instant application

It is alleged by the liquidator that:

The business of the Company had been carried on with reckless disregard of [sic]:

a. the insufficiency of the Company's assets to satisfy its debts and liabilities and/or

b. the Company's obligations to pay its debts and liabilities as illustrated inter alia by: -

(1) the failure by the Company to rectify the deficiencies in the

(a) ***statutory fund since 1992 and***

(b) ***statutory deposit since 2000***

when the Company should have deposited with Central Bank sufficient funds for the protection of policy holders.

(2) The failure of the Company to address the deficits in the ***margin of solvenc****y where liabilities exceeded assets* **since 1996** *which arose from:*

i. An escalation in outstanding claims payable from 2000

ii. Disposal of the profitable life portfolio of the Company without any and/or any apparent remuneration (sic)

iii. Disposal of the real estate holdings of the Company without any and/or any apparent remuneration.

(3) The fact that over a long period of time the liabilities of the Company exceeded its assets and nothing was done to rectify this situation.

(4) The failure of the Company to inject capital into the Company to increase the asset base of the Company to cover its liabilities.

(5) The failure of the Company to ensure that its business was operated in an efficient manner as evidenced by inter alia:

i. absence of a proper accounting system

ii. untimely preparation of financial statements

iii. absence of adequate control over agents and brokers

iv. inadequate arrangements for re-insurance

v. charging inadequate premiums.

(6) That the Company continued to write business and/or issue policies of insurance although it ought reasonably to have been aware that it did not have the resources to pay its debts and liabilities and/or that its assets were insufficient to satisfy debts and liabilities.

It was also alleged that the business of the Company had been carried out with intent to defraud creditors and/or for a fraudulent purpose as illustrated by, inter alia: -

a) The inclusion of assets in the Act Accounts that did not exist or were not assets of the Company, namely, the Surinamese lands and the Cascade lands.

b) The placing of values for the Surinamese lands and/or the Cascade lands which were disingenuous and/or meant to

mislead by artificially attempting to bolster the accounts of the Company.

c) *The sale of insurance cover and the receipt and/or collection of premiums for insurance coverage when the company had no and/or no real prospect of being in a financial position to meet claims in relation to the said policies.*

d) *Collecting premiums for insurance coverage for motor vehicles which allowed the policy holders to meet their statutory obligation while knowing that claims arising from the said statutory obligation of the policy holder would not be met.*

e) *Continuing to underwrite insurance policies in breach of the directions of the Central Bank.*

It is these allegations that must be tested on the evidence to determine whether any of the above breaches of s.441 of the Companies Act which have been alleged have occurred of such a nature as to permit or require a declaration that some or all of the directors, past or present are personally responsible for all or any of the debts of Goodwill.

Summary

The Financial Condition of Goodwill

By virtue of the Insurance Act, Chap. 84:01, s 77 (1),

" A company carrying on general insurance business shall be deemed for the purposes of the Companies Act to be unable to pay its debts where the value of its admissible assets does not exceed the amount of its liabilities by whichever is the greater of the following amounts:

(a) Two hundred and fifty thousand dollars; or

(b) Twenty per cent of the general premium income of the company computed as at the end of its last financial year

Pre 1999 Financial Condition

Goodwill's Margin of Insolvency from 1992 to 1999

The liquidator appointed by the court established the financial condition of Goodwill without contest, save in the final written submissions of Woodley and Lambkin.

Goodwill was insolvent since 1996. The margins of insolvency under the Insurance Act for years ending 1992 to 1999, as set out in affidavit of liquidator filed on July 14th 2008 were as follows:

The margins of solvency under the Insurance Act solvency test are set out below in tabulated form for ease of reference:

Year ending 31 December 1992	*3,537,507*
Year ending 31 December 1993	*2,062,175*

Year ending 31 December 1994	*2,332,835*
Year ending 31 December 1995	*581,908*
Year ending 31 December 1996	*(1,116,695)*
Year ending 31 December 1997	*(2,506,357)*
Year ending 31 December 1998	*(1,795,874)*
Year ending 31 December 1999	*(882,013)*

*NOTE - * figures in brackets are negative.*

Claims Admitted

As at 30th April 2008 claims admitted by the liquidator were to the value of $23,590,738.39 which included amounts reserved and of which $11,625,464.59 comprised judgment debts.

Goodwill's Statutory Deposit

This was also negative for the years 1992 to1999:

The deficiencies of the said Statutory Fund are set out below in tabulated form for ease of reference:

Year ending 31 December 1992	*(242,164)*
Year ending 31 December 1993	*(1,441,458)*
Year ending 31 December 1994	*(1,209,642)*
Year ending 31 December 1995	*(2,353,055)*
Year ending 31 December 1996	*(2,590,981)*

Year ending 31 December 1997	*(3,232,109)*
Year ending 31 December 1998	*(3,687,119)*
Year ending 31 December 1999	*(1,213,771)*

*NOTE - * figures in brackets are negative.*

Claims Incurred to Earned Premium Ratio

Financial Year	*Earned premiums*	*Claims Incurred*	*Ratio*
1999	*2115*	*949033*	*
1998	*863293*	*1157402*	*134*
1997	*2388916*	*4923314*	*206*
1996	*2529706*	*1330783*	*52*
1995	*2376599*	*2105260*	*89*

Note -- Use of the ratio is meaningless as there was insignificant premium income in that year. This illustrates that the premiums charged by the Company were inadequate and/or insufficient to cover potential claims.*

Post Sale

Over the period 31 December 2000 to 31 December 2004 the Company generated losses as follows:-

Period ending 31 December 2000	($917,389.00)
Period ending 31 December 2001	($1,636,691.00)

Period ending 31 December 2002	($1,954,135.00)
Period ending 31 December 2003	($1,085,358.00)
Period ending 31 December 2004	($630,913.00)

*NOTE - * figures in brackets are negative.*

The year ended 31 December 2004 marked the last time for which accounts were prepared by the Company. No other accounts were prepared subsequent to that date.

The margins of solvency under the Insurance Act

Year ending 31 December 2000	(3,508,520)
Year ending 31 December 2001	(5,650,581)
Year ending 31 December 2002	(8,698,864)
Year ending 31 December 2003	(11,354,848)
Year ending 31 December 2004	(14,308,086)

NOTE - * figures in brackets are negative.

The position in relation to the said Statutory Deposit

Year ending 31 December 2000	(1,451,885)
Year ending 31 December 2001	(331,810)
Year ending 31 December 2002	(267,877)
Year ending 31 December 2003	(161,405)
Year ending 31 December 2004	(823,084)

*NOTE - * figures in brackets are negative.*

The position in relation to the said Statutory Fund

Year ending 31 December 2000	(2,496,664)
Year ending 31 December 2001	(2,434,132)
Year ending 31 December 2002	(4,370,303)
Year ending 31 December 2003	(4,726,719)
Year ending 31 December 2004	(5,790,369)

*NOTE - * figures in brackets are negative.*

Claims Incurred to Earned Premium Ratio

Financial Year	*Earned premiums*	*Claims Incurred*	*Ratio*
2004	*5600796*	*3973622*	*71*
2003	*4433349*	*3334473*	*75*
2002	*3840059*	*5282665*	*137*
2001	*4230675*	*2667301*	*63*
2000	*3594973*	*2379862*	*66*

Detailed Evidence of Material facts

The application is grounded in the facts found by the liquidator and set out in his 2 affidavits filed on July 14th 2008 and November 14th 2008 respectively. The tables set out above summarise Goodwill's financial position both before and after its sale to the second group of directors.

Further material relevant to the instant application: [edited for relevance] is set out from affidavit of Victor Herde filed on July 14th 2008 as follows:

43. When Demerara acquired the Company in 1992 the Company's margin of solvency for non-motor insurance business was $3,953,601.00 and the margin of solvency for motor business was $126,998.

44. Also as at the date of the sale to Demerara, [1992] the accumulated profit and loss account for non-motor insurance business was in deficit by $1,060,173.00 and the deficit for motor business was $1,977,752.00.

45. On 1 January 1994 the Company discontinued the underwriting of property insurance business (classified as "other business"). An agency agreement was entered into with GTM Fire Insurance Company Limited whereby the Company agreed to place all property insurance business with GTM on a commission basis.

46. As at 31 December 1995 the Company's auditors drew attention to the company's state of affairs by making the following statement:

> *"The company incurred a loss of $1,911.732.00 during the year ended 31 December 1995. The Directors are of the view that urgent capital injection or continued financial support is needed to enable the company to meet its financial obligations as they fall due."*

47. It would appear that in 1996 the Company and Demerara entered into an agreement whereby the Company agreed to transfer its life business portfolio as at 28th February 1992 to Demerara. Further, by the said Deed the Company transferred to Demerara four (4) properties known as 60 Independence Avenue, San Fernando, Lot 7 Mausica Road, D'Abadie, Lot 7 Marie Street, Chaguanas and Lot 113 Santa Monica Gardens, Arima as well as other investments, securities and cash.

48. There was no novation in relation to life insurance business (and I have found no evidence of such). Rather, Demerara gave an indemnity to the Company in relation to life insurance business. This meant that the primary liability under the life policies would remain with the Company and when a claim was made thereunder the Company would then have to invoke the indemnity against Demerara.

49. The effect of this transaction was to give the financially sound arm of the Company's business (life insurance) to Demerara and leave the Company with the motor insurance business which was not in a financially sound position at all at the time. There does not appear to have been any monetary consideration for the transfer of the life insurance portfolio aforesaid.

50. 1996 was the first year that the Company became insolvent. The Company continued thereafter to be insolvent until I was appointed as Liquidator.

51. Further, according to the Act Accounts filed for 1997 the Company no longer had any real estate which had previously been valued at $5,845,380.00. The Company divested itself of the said real estate by transferring same to Demerara by the said Deed hereinbefore referred to at paragraph 47 hereof. The Company then became more insolvent. The Company's Statutory Fund continued to be in a state of deficiency.

53. It appears that the Supervisor of Insurance raised the financial state of the Company with both its Board and Demerara because by letter dated the 21st November 1997, Demerara wrote to the Supervisor of Insurance confirming that it would make immediate arrangements to advance $2,700,000.00 from its own Statutory Fund to satisfy the deficit in the Company's Statutory Fund (which as at 31st December 1996 stood at $2,590,981.00)

61. As at 31 December 1999 the Company's assets stood at $2,121,372 having decreased by $11,488,208 from a total of $13,609.580.00 at 28 February 1991.

74. A critical aspect in the management of an insurance company in Trinidad and Tobago is the constant review of the "Claims Incurred to Earned Premium Ratio" to ensure the viability of the company. Most companies that underwrite motor business set a goal of 50 % which ensures that premium income is sufficient to cover claims incurred. A review of the earned premium to claims incurred ratio over a ten year period is set out below:

Financial Year	*Earned premiums*	*Claims Incurred*	*Ratio*
2004	*5600796*	*3973622*	*71*
2003	*4433349*	*3334473*	*75*
2002	*3840059*	*5282665*	*137*
2001	*4230675*	*2667301*	*63*
2000	*3594973*	*2379862*	*66*
1999	*2115*	*949033*	*
1998	*863293*	*1157402*	*134*
1997	*2388916*	*4923314*	*206*
1996	*2529706*	*1330783*	*52*
1995	*2376599*	*2105260*	*89*

Note -- Use of the ratio is meaningless as there was insignificant premium income in that year. This illustrates that the premiums charged by the Company was inadequate and/or insufficient to cover potential claims.*

The financial Condition of Goodwill over the period 2000-2006

65. As at 31st December 1999 the Company's Statutory Fund was in deficit by $1,213,771. 00. By letter dated 26th March 2001 attached hereto and marked ***"V.P.H.19",*** *the said Lennard Woodley wrote to Demerara informing them of the Company's deficit of $1,213,771.00 in the Statutory Fund and called upon Demerara to accept responsibility for this deficit. I am not aware of any response to this letter. The amount $1,213,771.00 was disclosed as an asset in the Company's Financial Statement*

and Act Accounts as of 31st December 2001 and was described as "Demerara Life's Statutory Obligation".

66. Included for the first time in the Financial Statements at 31 December 2000 were two items of real estate:

(i) Lands in Suriname acquired through the Company's "subsidiary" and disclosed at a valuation of $22,491, 000.00.

(ii) Freehold property in Cascade disclosed at a valuation of $3,200,000.00 having been acquired at a cost of $200,000.00.

This disclosure was accompanied by a corresponding entry under Capital Reserve of $25,491,000.00.

69. Four years later in 2004 the value of the Surinamese land was declared at $44,400,000.00. Assuming for the moment that the Company had in fact acquired 100% interest in the land or the subsidiary's shareholding, I have found no documentary record of this acquisition nor am I able to say where the Company could have found the funds to have made the additional acquisition.

70. The Central Bank has never accepted this Surinamese land as an admissible asset of the Company from the time it appeared on the Company's financial records. This is quite clear from the statement of the company's solvency margins set out in the Governors notice attached hereto and marked V.P.H.15. ***Indeed, if it was a valid, marketable asset***

of the Company it could be have been sold and the intervention of the Central Bank would have been avoided altogether.

72. The freehold land in Cascade measuring 2.6669 hectares was acquired on 19 September 2000 via Deed No. 20188 of 2000 for the sum of $200,000. On 28 November 2001 the property was sold to a related company by the name of West Indian Financial and Development Company Limited for the sum of $1.2million. Despite the disposal of this property the Company continued to include this item in its financial statements for the years ended 31 December 2001, 2002 and 2003. The item was eventually deleted during the year ended 31 December 2004.

Findings of the Liquidator

21. By his report dated 7th May 2007 ("**the First Report**") and attached to his affidavit in the liquidation filed on the 9th May 2007 the liquidator reported in relation to the liquidation to the Court *inter alia*:-

(i) An estimated total claims figure of $30,073,563.00,

(ii) The market value of the Company's assets was $1,582,276.00,

(iii) Consequently there was an estimated deficit of $28,491,287.00.

22. His investigations of the books and records of the Company including those submitted to Central Bank and the assessments of Goodwill's accounts conducted by Central Bank revealed the following information:

(i) The audited accounts submitted by Goodwill for the following

years ending 31st December disclosed the following deficits:-

1999 – deficit of $1,234,390.00

2000 – deficit of $3,467,720.00

(ii) The un-audited accounts submitted by Goodwill for the following years ending 31st December disclosed the following deficits:-

2001 – deficit of $4,006,437.00

2002 – deficit of $8,662,386.00

2003 – deficit of $11,169,336.00

2004 – deficit of $14,308,056.00

No accounts were ever provided beyond 2004.

(iii) The company's Statutory Deposit was in deficit for the years ending 31st December 2000 to 2003,

(iv) The company's Statutory Fund was also in deficit for the years ending 31st December 1996 to 2003,

(v) The company had failed or neglected to rectify the said deficits notwithstanding the directives of the Central Bank and its predecessor, the Supervisor of Insurance, to do so while continuing to carry on the business of the Company

23. By his report dated 20th September 2007 ("**the Second Report**") and attached to his further affidavit in the liquidation filed on the 26th September 2007 he again reported on the liquidation to the Court. The report disclosed a total claims figure of $24,149,534.00

of which $21,563,430.00 related to insurance policy holders and $2,586,104.00 related to non-insurance matters like rent, severance pay and the provision of services.

Further according to paragraphs 26, 27, and 28 of the said affidavit of Victor Herde -

26. *On the 7th March 2006 the Central Bank of Trinidad and Tobago exercised its power of intervention and imposed requirements on the company which included inter alia the following requirement:*

> *"refrain from effecting any contracts of insurance whether new or renewal or changes in contracts in all classes of business" with effect from 7th March 2006.*

27. On 8th March 2006 the Central Bank published in the three local newspapers a Supplemental Notice with the stated requirements that the company refrain from effecting any contracts of insurance.

28. Despite these directives the Company's agents and brokers continued to write business. The Central Bank visited the Company's premises on 12th April 2006 and 3 May 2006 to determine whether the company was operating in compliance with its requirements and discovered that the Company had breached its order on at least 9 occasions.

The liquidator listed [VPH 7] 432 instances whereby claims were made by insureds on policies issued contrary to the Central Bank's directive on March 7th 2006.

In addition the liquidator published a notice in all 3 local daily newspapers notifying policyholders of cancellation of all policies as at January 8th 2007 and notifying the public that the company's agents and employees were not authorised to issue insurance certificates.

The position summarised

In summary therefore, it is clear the liquidator found that Goodwill became insolvent in 1996, the year its life insurance portfolio was transferred and that it never regained a position of solvency as there remained a deficit in the value of the assets in the statutory fund. Later that deficit was sought to be disguised by the attempt to include 2 particular assets therein, land in Cascade - which had been sold on November 28th 2001, and land in Suriname - which was never accepted by the Supervisor of Insurance.

He was also concerned that the company had been stripped of its most profitable assets before being sold - including its life portfolio, associated assets, and its head office. For this he thought the previous directors should be called to account.

The undisputed fact is the company was kept in operation without adequate reserves of capital so that over many years its assets were exceeded by its liabilities, its margin of solvency was unacceptable, its statutory fund was in deficit, and its ability to satisfy all legitimate claims was seriously jeopardized. Its policy holders and the public were at risk, but it continued to issue policies and collect premiums, and it perpetrated the

fiction that there was an imminent capital injection from potential overseas investors and that there were unsubstantiated real property assets available for inclusion in the statutory fund at self stated and possibly inflated values. Its responses to the requests of the Regulator – both Supervisor of Insurance and subsequently Central Bank - that it rectify its financial status and the timeliness of production of its accounts were also unacceptable.

This was prima facie an unacceptable way to run an insurance company, far less one that offered motor vehicle insurance within a statutory framework designed for the benefit of the public. It demanded investigation.

Law

Section 447 of the Companies Act

Section 447(1) provides as follows -

"If in the course of the winding up of a company it appears that any business of the company has been carried on –

(a) With intent to defraud creditors of the company or the creditors of any other person or for any fraudulent purpose;

(b) With reckless disregard of the company's obligations to pay its debts and liabilities; or

(c) With reckless disregard of the insufficiency of the company's assets, to satisfy its debts and liabilities, the Court, on the application of the Official Receiver or the liquidator or any creditor or contributory of the company, may if it thinks proper to do

so, declare that any of the officers, whether past or present, of the company or any other persons who were knowingly parties to the carrying on the business in that manner are personally responsible without any limitation of liability, for all or any of the debts or other liabilities of the company, as far as the Court may direct."

It appears that the sanction in sub paragraph (c) must be read to qualify sub paragraphs 447 (1) (a) and 1 (b) also or else they would be rendered meaningless.

Researches of Counsel for the liquidator reveal that provisions akin to S.447 (i) (a) derive from S.75 of the U.K. Companies Act 1929 and are reincarnated subsequently as S.275 U.K. Companies Act 1929, S.332 U.K. Companies Act 1948 and S.458 U.K. Companies Act 1985 culminating in S.213 of the U.K. Insolvency Act 1998. Liability associated with carrying on the business of a company recklessly was addressed in S.424 (1) Companies Act 1973 South Africa and S.297 A (1) Companies Act 1963 - Ireland.

Standard of Proof

Knowingly

Those researches also produced the following case law:

In ***Re a Company No. 001418 of 19988 [1990] BCC 526*** for a person to be knowingly a party (in the context of fraudulent trading) actual realisation at the time the debts were incurred that there was no reason for thinking that funds would be available to pay the debt in question when it became due or shortly after was required.

However, in ***Re Bank of Credit and Commerce International SA & Ors Morris & Ors v State Bank of India [2003] B.C.C. 735***, Patten J. stated that,

"Knowledge includes deliberately shutting one's eyes to the obvious, provided that the fraudulent nature of the transactions did in fact appear obvious".

Howie J.A. in ***Philotex (Pty) Ltd v Snyman 1998 (2) SA 138 (Supreme Court of Appeal of South Africa)*** at pg 62 stated that,

""Knowingly" means having knowledge of the facts from which the conclusion is properly to be drawn that the business of the company was or being carried on recklessly; it does not entail knowledge of the legal consequences of those facts."

He continued that

"*Being a party to the conduct of the company's business does not have to involve the taking of positive steps in the carrying on of the business; it may be enough to support or concur in the conduct of the business."*

I accept all these propositions as elucidating the nature of the state of mind required, including "actual realisation that no reason for thinking that funds would be available to pay the debt in question" "shutting one's eyes to the obvious", and "knowledge of the facts".

Intention to Defraud

In ***Re a Company No. 001418 of 19988 [1990] BCC 526*** it was held that there must be actual dishonesty involving, according to current notions of fair trading among commercial men, real moral blame. Bromley J. said,

"There is intent to defraud....if the person responsible was intending to deceive or actually deceived a supplier that he would be paid at the stipulated time or shortly thereafter when the person so intending knew perfectly well that there was no hope of that coming about."

I accept that with respect to intention to defraud, actual dishonesty, real moral blame, and intent to deceive (even if no one is actually deceived), are all relevant indicia.

Reckless disregard

It was submitted that there may be some degree of overlap between s.447 (1) b, and s.447 (1) (c) and findings on each may properly be made out of the same factual scenario. The language of the provisions supports this.

In ***Philotex (Pty) Ltd v Snyman 1998 (2) SA 138 (Supreme Court of Appeal of South Africa)***, Howie J.A. referred to several previous cases which concluded that the ordinary meaning of recklessly included gross negligence with or without risk-taking. Gross negligence he said was,

> *"an attitude or state of mind characterised by an entire failure to give consideration to the consequence of one's actions, in other words, an attitude of reckless disregard of such consequences."*

The formulation has been approved recently by the South African Supreme Court of Appeal in ***Ebrahim v Airports Cold Storage (Pty) Ltd*** **(485/2007) [2008] ZASCA 113** at pg. 11.

I accept that reckless disregard in this context includes gross negligence and failure to have regard to consequences.

The issues remaining therefore are whether if any of the directors are culpable and to what extent for reckless disregard of the company's obligations to pay debts and liabilities or reckless disregard of the insufficiency of the company's assets to satisfy its debts and liabilities. (in relation to all the directors) or for carrying on business of the company with intent to defraud creditors (only in relation to the first group of directors).

I accept that as a matter of principle a proper construction of s.447 would require that recovery against each director would be in relation to and in proportion to, his respective degree of culpability and contribution to the resulting financial condition of the company. It would not be equitable for a director to be saddled with the obligation to pay the entirety of a company's debts if the evidence established that his own conduct did not contribute significantly to the insolvency of the company and in fact the conduct of another director was responsible for the majority of those debts. It must therefore be a question of fact to be determined by an analysis of the evidence as to the level of contribution, if any, to be required of each director.

THE INDIVIDUAL DIRECTORS

The First Group

It is necessary to extract the material relevant to each respondent to ascertain whether the law set out above applied to the circumstances of each permits a finding and declaration of personal responsibility in relation to each for the debts of Goodwill.

Albert Tom Yew

Tom Yew is the Managing Director /Chief executive Officer of Mega Insurance. His tenure as director of Goodwill, according to him, was April 18, 1997 to December 29th 1999. He and John Lindsay Gillette were appointed on the same date to represent the interests of Mega which had recently become the sole shareholder of Demerara. At the time he assumed the directorship Goodwill was insolvent. He claims that at the end of his tenure Goodwill's statutory deposit was positive.

The liquidator contends that it appears Tom Yew, Russell, Fields and Gillette recognized that the insolvency position of Goodwill was so dire that they even took a decision to wind up the company. Tom Yew denies this (claiming they only considered shutting down) but **Exhibit ATY1** pg 70 which is a 25th June 1998 Goodwill board meeting tendered into evidence revealed as follows -

(i) Item 2 thereof states that "*as a result of the Company going out of business*"

(ii) item 21 states that "*all staff members received part payment of their severance*".

Further Item 15 pg. 61 exhibited to Tom Yew's affidavit stated, *"the company has taken the decision to discontinue business and wind up operations as at 31st July 1998"*.

Goodwill wrote no new business in 1998 and 1999.

I find therefore that it was clear that the then directors had considered shutting down the company and took significant steps toward achieving this end. It is also clear that they were aware the company was in financial difficulty. The issue remains however whether they acted with reckless disregard of the company's obligations to pay debts and liabilities or reckless disregard of the insufficiency of the company's assets to satisfy its debts and liabilities.

Sale of Abercromby Street Headquarters

The Liquidator contends that from minutes of a meeting of the board of Mega on 19 November 1997 (**ATY1** pg 21) it is clear that Mega was aware of Goodwill's state and that its Abercromby Street Property (the property) had been recently valued at $8.3M.

The Supervisor of Insurance was aware of the proposed sale but directed by its letter to Demerara dated the 2nd December 1997 that "*the purchase is to be conducted on an arm-length basis and should reflect the current market value of the property*"

On the 8th December 1997, Bertrand Doyle, Chairman of Demerara at the time, wrote to Messrs. B.D. Hewitt & Co. offering the sum of $6M for the Property (**Exhibit C**). A valuation of $6M appears to have been submitted with the letter which was produced at trial by Senior Counsel for Gillette, Russell and Fields, though not the draft agreement for sale or the previous correspondence.

The Liquidator contends Tom Yew, Russell, Fields and Gillette did not go to the shareholder, Demerara, to get a capital injection. They sold the last remaining asset of Goodwill to its parent company, Demerara at a $2.3M undervalue.

He contends further:

(i) that evidence from the Act Accounts' Balance Sheet for year ending 1997 showed that Goodwill paid off its entire owings to Demerara, its shareholder, in the sum of $2,560,381.00,

(ii) that money should have been gone to pay claims,

(iii) the board clearly gave preference to Demerara in managing Goodwill,

(iv) there was no concern for the payment of outstanding claims, and

(v) the Property was deliberately undersold in contravention of the directive of the Supervisor.

There is the evidence that the headquarters of Goodwill on Abercromby Street were sold at a price of $6 million, based on a valuation for this amount, when there was an earlier valuation for $8.3 million. The valuation for $6 Million was apparently commissioned by Demerara whose Chairman was Bertrand Doyle. Doyle was the author of the offer of purchase to Goodwill. Doyle was also a consultant to Goodwill and present at the meeting of the Board of Goodwill on December 11 1997 which considered Demerara's offer.

Clearly therefore there was the potential for a serious conflict of interest between Demerara and Goodwill and the opportunity for Demerara to acquire the Abercromby Street property at a discount from a cash strapped Goodwill under pressure from the Central Bank to improve its financial position. There is no evidence as to whether the property was advertised or whether there were other offers.

Findings

The liquidator contends that Tom Yew, Russell, Fields and Gillette knowingly carried on the business of Goodwill with reckless disregard of the insufficiency of the company's assets to satisfy its debts and liabilities and the company's obligation to pay its debts and liabilities pursuant to section 447(1) (b) and (c) by paying off Goodwill's debt to Demerara in full, in priority to other claims.

While the Goodwill board may have given preference to paying debts to Demerara, it did not ignore all its debts to other creditors. Further Demerara was one of those creditors. Goodwill was in a dire financial position. It had to find capital or funds to meet a deficit in its statutory fund. Demerara offered to supply those funds by purchasing its Abercromby Street property.

As regards the sale of the Abercromby Street building the sale had to take place with urgency as Goodwill was under pressure from the Central Bank. Despite the seeming admissions of Tom Yew that the property was apparently sold at an undervalue I am not satisfied that there is sufficient evidence to find that the sale was in fact at an

undervalue as I am unable to determine whether the property could in fact have attracted a sale price closer to $8.3m.

Were I to have been so satisfied on the evidence I would have concluded that s.447 (1) (a) – knowingly carrying on the business with the intention to defraud creditors and policy holders - had been infringed. The liquidator is not claiming this in relation to the first group of directors.

I find the transaction has elements which would excite suspicion in a reasonably prudent court appointed Liquidator. While the sale of the Abercromby Street building occurred in circumstances that gave rise to suspicion of conflict of interest and would have merited far greater scrutiny at the time, it is difficult to establish a causal link between that sale and the company's financial shortfalls. I conclude that in fact the sale may have mitigated or postponed those shortfalls.

Neither am I able to find the first group of directors acted with reckless disregard of the company's obligations to pay debts and liabilities or reckless disregard of the insufficiency of the company's assets to satisfy its debts and liabilities in paying Demerara first, once those were legitimate debts. There is no evidence that they were not.

With respect to the transfer of the life insurance portfolio without consideration to Goodwill and the transfer of the four properties and other assets, Mr. Russell and Fields explained that this transfer was in effect a reallocation of the portfolio to the parent

company which did not need to provide consideration as it was already the owner of Goodwill. The assets corresponding with the life portfolio had to also be transferred. This was apparently accepted by Mr. Herde. This predated the involvement of Tom Yew and Gillette, and would be relevant only to Russell and Fields. I therefore find this aspect of the evidence does not by itself establish any breach of s.447 of the Companies Act.

Further I accept that they were in a difficult position.

The situation that the first group of directors found themselves in was unfortunate. They faced a dilemma - whether to close the business or seek to trade out of difficulty. I accept that the mere fact that Goodwill traded while deemed to be insolvent would not automatically lead to a finding of culpability

In **Re Uno Plc & Avon Secretary of State for Trade and Industry v. Gill & Ors [2004] EWHC 933,** in dealing with an application for the disqualification of directors under the U.K. Companies legislation the Court made certain observations on the question of trading whilst insolvent as it affected directors liability at pgs. 31 & 32 of the judgment –

After considering the relevant provisions of the 1986 Act and the district judge's decision below, Chadwick J said this (at 348 to 349):

> *"The companies legislation does not impose on directors a statutory duty to ensure that their company does not trade while insolvent; nor does that "legislation impose an obligation to ensure that the company does not trade at a loss. Those propositions need only to be stated to be recognised as self-evident.*

Directors may properly take the view that it is in the interests of the company and of its creditors that, although insolvent, the company should continue to trade out of its difficulties. They may properly take the view that it is in the interests of the company and its creditors that some loss-making trade should be accepted in anticipation of future profitability. They are not to be criticised if they give effect to such view. But the legislation imposes on directors the risk that trading while insolvent may lead to personal liability. Section 214 of the Insolvency Act imposes *that liability* ***where the director knew, or ought to have concluded, that there was no reasonable prospect that the company would avoid going into insolvent liquidation.*** (Emphasis mine*)*

If it is established, in proceedings under s. 6 of the 1986 Act, that a director has caused a company to trade when he knew, or ought to have known, that there was no reasonable prospect that the company would avoid going into insolvent liquidation that director may well be held unfit to be concerned in the management of accompany.' …….

If the director is to be found unfit there must ordinarily be an additional ingredient. Normally that ingredient is that, at the time that the credit is taken (or the advance payment received, which is in essence the same), the director knows or should know that there is no reasonable prospect of his company avoiding insolvency."

Knowingly allowing the company to trade while insolvent therefore does not of itself require automatic disqualification under that Act.

Later on in the judgement the Court referred to the judgement of **Park J in Re. Continental Assurance Company of London Plc [2001] BIR 733 @ 817 (para:281**) and cited same with approval. At pgs.36 and 37 it is stated –

> "156. The dilemma, which is one which directors of companies suffering financial difficulties frequently have to face, was tellingly described by Park J in *In re Continental Assurance Company of -London Plc* [2001] BPIR 733 at 817 (paragraph 28l):
>
> *"An overall point which needs to be kept in mind throughout is that, whenever a company is in financial trouble and the directors have a difficult decision to make whether to close down and go into liquidation, or whether instead to trade on and hope to turn the corner, they can be in a real and unenviable dilemma. On the one hand, if they decide to trade on but things do not work out and the company, later rather than sooner, goes into liquidation, they may find themselves in the situation of the respondents in this case - being sued for wrongful trading"*
>
> *"On the other hand, if the directors decide to close down immediately and cause the company to go into an early liquidation, although they are not at risk of being sued for wrongful trading, they are at risk of being criticised on*

other grounds. A decision to close down will almost certainly mean that the ensuing liquidation will be an insolvent one. Apart from anything else liquidations are expensive operations, and in addition debtors are commonly obstructive about paying their debts to a company which is in liquidation. Many creditors of the company from a time before the liquidation are likely to find that their debts do not get paid in full. They will complain bitterly that the directors shut down too soon; they will say that the directors ought to have had more courage and kept going. If they had done, so the complaining creditors will say, the company probably would have survived and all of its debts would have been paid. Ceasing to trade and liquidating too soon can be stigmatised as the cowards' way out."

I accept this is akin to what apparently occurred here. The directors had to find funds under pressure from the Supervisor which they did by selling the Abercromby Street property. They took steps to limit staff and expenses, and then finally offered the Company for sale. These steps did involve the company trading while deemed to be insolvent.

It is not that fact alone which will give rise to culpability under s. 441. It is the presence of the further mental elements of carrying on business of the company **with intent to defraud creditors** or **reckless disregard** of the company's obligations to pay debts and liabilities or **reckless disregard** of the insufficiency of the company's assets to satisfy its

debts and liabilities. The presence or absence of the requisite mental elements can be inferred from an examination of the facts.

Despite the fact that Goodwill was insolvent since 1996 I do not accept the liquidator's allegations against the first group of directors for the following reasons:

(1) The state of Goodwill's finances did improve, albeit not sufficiently, during their tenure. The first group of directors of Goodwill had been informed in 1998 of the statutory deficit. The directors at the time took steps, albeit short term and less than adequate steps to address this. These steps were:

(i) Holding meetings to address the situation.

(ii) Arranging the advance of transfers from Demerara's statutory fund to fill the deficit in Goodwill's statutory fund.

(iii) Effecting a sale of Goodwill's headquarters to realise funds.

(iv) Selling the company to investors who promised a capital injection.

(2) Although the head office of Goodwill was sold it was necessary to restore Goodwill's solvency in light of the Supervisor’s communications.

(3) Two members of the first group of directors were appointed in 1997 and met the situation of Goodwill's insolvency. The situation did improve over the 2 year period of their tenure - indicating that steps - whether effective or long term does not really matter - were being taken to reverse the trend. In addition audited

accounts for 1999 would not have been available to that board at the time of their resignation, though management accounts for most of that year may have been available.

I find the evidence insufficient to establish intent to defraud, or reckless disregard of insufficiency of assets to pay liabilities or reckless disregard of Company's obligation to pay debts and liabilities. In fact the sale of the company's headquarters was consistent with the opposite of that – an intent to find cash from the most immediate source to provide the requisite capital injection.

Findings in relation to Directors

Applying the facts I have found to the legal tests necessary to satisfy a finding of "intent to defraud" or 'reckless disregard" I find in relation to Tom Yew and Gillette that on the totality of the evidence which emerged there is insufficient evidence to conclude, even on a balance of probabilities, that they acted with reckless disregard of the company's obligations to pay debts and liabilities or reckless disregard of the insufficiency of the company's assets to satisfy its debts and liabilities .

I make the same finding in relation to Fields and Russell, though their period of tenure was longer and encompassed the period when the life and property portfolios were divested. I cannot conclude these actions of themselves were done with reckless disregard of the company's obligations to pay debts and liabilities or reckless disregard of the insufficiency of the company's assets to satisfy its debts and liabilities.

The first group – whether s. 447 culpability

I find the first group of pre sale directors did in fact take steps to address the issues of solvency and the requirements of the Regulator by the sale of the Abercromby Street headquarters of Goodwill, the attempt to reduce costs, the cessation of new business - to avoid accruing further liability, and then by the sale of the company itself.

For the purpose of s 447(1) I consider that I do not have to determine whether those were effective measures or long term measures. I do not have to determine whether the sale of the headquarters was to a related party or at an undervalue. I simply need to determine whether the directors in the first group carried on the business with reckless disregard of the company's obligations to pay debts and liabilities or reckless disregard of the insufficiency of the company's assets to satisfy its debts and liabilities. I find they did not and were not therefore in breach of s. 447 of the Companies Act.

THE INDIVIDUAL DIRECTORS

The Second Group

St. Cyr

It is not disputed that St. Cyr became a director on the 29th December 1999. His evidence is that he carried out his duties as a director from then until he resigned on the 31st January 2001 but the corporate records did not reflect this. His health declined and his participation diminished in the latter half of his tenure. His non-involvement in the management of the company has been confirmed by Taylor and Lambkin.

His letter of resignation purportedly sent in January 2001 was not in the company's records.

The liquidator submits that St. Cyr knowingly carried on the business at the very least between January/February 2000 to mid-July 2000 with reckless disregard of the insufficiency of the company's assets to satisfy its debts and liabilities and the company's obligation to pay its debts and liabilities pursuant to Section 447(1)(b) and (c).

St. Cyr appears to have been at a meeting with the Supervisor on 11th July 2000 when he pointed out that "*the company wrote approximately $3.2 million in insurance business over the last six months*" giving financial particulars of Goodwill for the last six months when he claims he was not in the know as to what was the financial position.

He also gave instructions for a valuation of property which occurred in September 2000.

Finding

St. Cyr was not cross examined on his affidavit. I accept that St. Cyr's involvement may have been more than he disclosed but it is not disputed that his role was reduced and his involvement in the Company restricted over the course of his tenure with the company. In relation to his

(a) Knowledge,

(b) Presence at the company,

(c) Responsibility,

(d) Participation and involvement,

I find that there is not sufficient evidence to affix St. Cyr with liability.

Costs

In relation to him his position was set out in a letter pre dating the hearing of this action. Attorneys on his behalf made an application for security for costs, which primarily because of the stage at which it was made, I was constrained to dismiss. The costs of the application were then reserved. In addition a preliminary point was taken by Attorney on his behalf. The costs of the liquidator on the application for security for costs and on the preliminary issue on which I find he was unsuccessful, would normally be payable by St. Cyr.

However bearing in mind

(a) My findings in relation to him on the substantive matter,

(b) That the liquidator did not seek to cross examine St. Cyr,

(c) That St. Cyr's final exoneration came from his fellow directors in their affidavits and at trial,

(d) Considerations of public policy to which I later refer,

I consider on balance that those cost orders should be set off against any costs that might otherwise have been awarded to him. The result would be that St. Cyr and the Liquidator each bear his own costs.

The Liquidator contends that on the evidence Lambkin, Taylor and Woodley

(i) knowingly carried on the business with the intention to defraud creditors and policy holders pursuant to Section 447(1) (a) between January 2000 (or at latest September 2000) and September 2006. The company continued to take policyholders' money when they would have been aware that there was no chance that in the event liability was incurred same could be paid.

(v) knowingly carried on the business with reckless disregard of the insufficiency of the company's assets to satisfy its debts and liabilities and the company's obligation to pay its debts and liabilities pursuant to Section 447(1), (b) and (c) between the period January 2000 (or at latest September 2000) and September 2006.

Taylor

The Liquidator contends that though Taylor claimed that he resigned as a director on the 17th July 2000 and did not act as director since then, his "letter of resignation" at Exhibit PET9 of his first affidavit filed 5th November 2000 was not a letter of resignation.

Although the Liquidator submits that Taylor was a director of Goodwill from 29th December 1999 carrying on the business of Goodwill right up to the time the Central Bank commenced these proceedings in 2006, and the corporate records of the company do not disclose that he resigned as a director, Woodley, St Cyr, and Lambkin support his

evidence that he resigned or departed from the company in circumstances of conflict among the second group of directors around July 2000.

In the circumstances I find on a balance of probabilities that Taylor ceased to be a director of Goodwill in July 2000, and that his tenure as a director was approximately 7 months.

That is not the end of the matter however. There were allegations made against Taylor both by the liquidator and by his former fellow directors, in relation to inter alia, the formation of a company named Goodwill Premium Financing which was separately controlled by him, and the absence of any correlation between the company's interim accounts at the time he left and its cash position in the Bank. In addition the Liquidator contended that there was evidence that a company of which he was director – Bankers Re billed for a performance bond dated October 23 2003 purportedly issued by Goodwill– thereby defrauding Goodwill of the revenue therefrom, and suggesting some unexplained link with Goodwill after his alleged resignation.

In cross examination Taylor explained that the revenue of Goodwill during his tenure consisted in large part of receivables, still outstanding at the time of his resignation from the Company. This is corroborated by Woodley in his witness statement. Curiously Taylor claimed in effect that Goodwill Premium Financing was pursuing a separate business and the income therefrom was not for Goodwill's account. In any event control of this company was wrested from him by Woodley. As to the performance bond this

remained without satisfactory explanation, though Taylor did say that he was based in St. Lucia at the time it was signed.

There are clearly areas still unexplained surrounding the tenure of Mr Taylor, and matters that the Liquidator would have been justified in seeking to investigate. However in the context of s.447 I am unable to determine that there is sufficient evidence to enable a finding that he was carrying on business of the company with intent to defraud creditors. The evidence in this regard is conflicting and does not in my view attain the threshold for me to make such a finding.

With respect to acting with reckless disregard of the company's obligations to pay debts and liabilities or reckless disregard of the insufficiency of the company's assets to satisfy its debts and liabilities I find that such evidence as there is, appears to support the contention that Goodwill had written significant business and had significant premium income during his tenure to be collected as receivables.

Costs – The First Group of Directors

Public Policy

I find that there were areas in the management of Goodwill and its history of steadily deteriorating financial position which were revealed on the liquidator's investigation and which required explanation in relation to the first group of directors, for example:

(1) the reason for the transfer to the parent company of profitable arms of business,

(2) the reason for failure to seek capital injections from its parent company,

(3) whether the sale of the headquarters to the parent company was at an undervalue, and

(4) whether the directors wrongly gave priority to paying debts to Demerara rather than paying claims.

Notwithstanding the above matters that required explanation I am unable to find on the evidence that the elements of the statute were fulfilled in relation to these directors. However it is appreciated that the court appointed Liquidator could form the view that the company had been denuded of its assets including real property and lines of business and that this required explanation.

The Liquidator, appointed by the court, ascertained that the assets of the Company were such that policy holders and creditors would receive 3.45 cents on the dollar. The Liquidator also found that Goodwill had been operated since 1996 in a state of insolvency. Goodwill was deemed by the Insurance Act test to be unable to pay its debts.

The options for paying costs are:

(i) that the Liquidator pay such costs out of the Company's assets – effectively reducing even the pittance now available to creditors , including judgement creditors ,who are to receive 3.45 cents on the dollar. Such persons must include persons who have suffered property damage, and may well include persons, who have suffered personal injury,

(ii) Further, though by definition during statutory insolvency Goodwill was deemed unable to pay its debts, an order for costs in favour of a director during a period of such insolvency would have the effect of making that debt payable, above all the many debts incurred by Goodwill, when no other debt would be capable of payment in full.

(iii) that the Liquidator pay such costs personally, at best relying on an indemnity provided to him by some other party. The liquidator is a court appointed liquidator fulfilling public functions initiated by the Regulator. I am not persuaded of the justification for requiring the Regulator or the Liquidator to reimburse costs incurred by any director who was a director at a time that Goodwill continued to trade while deemed unable to pay its debts .

I consider also the potential of rendering ineffective the statutory regime for regulation. Where a company subject to regulation trades while insolvent, a liquidator investigating culpability of directors may be deterred by the chilling prospect of a cost order against him personally, especially in a case, unlike the instant one, where such company has no assets, even if he were persuaded to rely on being subsequently reimbursed or indemnified by the Regulator. I consider that in this case where,

(a) there is a prima facie case on the material unearthed by the Liquidator which the directors are required to explain, and

(b) the Liquidator has acted under the direction of the court, following the procedures set out inter alia in the Companies Winding Up Rules,

the prospect of having to meet the costs of the directors being so investigated should not be a deterrent to effective regulation , proper investigation , or recovery.

Further, in the context of conduct which prima facie diminished the company's available assets in relation to a company which was deemed unable to pay its debts, I consider that it would be a perverse exercise of discretion were I to award any costs to directors in relation to an investigation of such conduct when they were the very directors who were responsible for operating the Company in breach of the Insurance Act. Of the many persons who would have to bear a loss upon the insolvency of Goodwill, I am not persuaded that the former directors should be placed in the privileged position of full recovery of their costs.

For these reasons I find it would be an inappropriate exercise of my discretion to require costs to be paid to those directors and I decline to make any such order. I am mindful that:

(a) Costs are discretionary.

(b) The usual order is that costs follow the event.

See for example **[Peter Seepersad v Capital Insurance (Privy Council Appeal 86 of 2002) at para.24.]**

I consider that the usual order would not be appropriate in these circumstances.

Having found as I do that such an investigation was sanctioned by the court and warranted in relation to matters for which they were responsible arising during their tenure; I order that each director of the first group of directors do bear his own costs.

Costs - Taylor

I find that while Taylor's involvement with Goodwill was brief his operation of Goodwill Premium Financing is curious. Though a director of Goodwill, he pursued business opportunities provided by Goodwill's operations and profited from them personally, possibly to the detriment of other creditors of the company if such profits could have been available to enhance Goodwill's financial position. Similarly, his inexplicable billing for a Goodwill performance bond long after he left Goodwill is unexplained. While the evidence in this regard does not attain the level required to support a firm finding of intent to defraud creditors or reckless disregard as required by s.447 it does attain the level required to establish,

1. there were issues for the liquidator to investigate, and

2. such conduct, without explanation, disclosure to the company, or sanction, would in my view disentitle such a director from receiving costs.

In the exercise of my discretion I therefore order that in relation to Taylor that he bear his own costs.

Lambkin

Mr Lambkin to his credit did attend the hearing though he was unrepresented by counsel. He filed an affidavit which attempted to explain why he could not be said to have carried on the business with intent to defraud, or with reckless disregard. Those reasons included:

1. not seeking to evade the situation - being present at meetings with the regulator.
2. personally paying claims.
3. not taking money from the company and running.
4. not allowing the company to accept large sums of suspicious cash or allowing it to be used as a conduit for money laundering.

He cross examined the witnesses in this matter and filed written submissions pursuant to the court's invitation to do so.

In his written submissions filed on July 14 2009 Mr. Lambkin makes similar points to Mr. Woodley in the latter's submissions. In addition he emphasizes a point raised by Mr. Woodley that the owner of Goodwill is in fact West Indian Financial and Development Company Limited and claims that the directors of that company are entitled

to an indemnity by the court. This submission is not developed and there is no application of that nature before this court.

Various sections of the Motor Vehicle Third Party Risks Act are cited as suggesting that there are circumstances where the Insurer either does not have to pay a claim or can recover from the insured.

I find these to be of no relevance to the instant application as there is no evidence that even on this respondent's interpretation of those provisions, they would be applicable to reduce or absolve Goodwill from meeting its liabilities under judgments obtained against it.

If it is intended to suggest that Goodwill can claim from its insureds all of the sums awarded against it by judgments of the court, this has only to be stated to demonstrate its absurdity. Sections 10 and sections 12(2) of the Motor Vehicles Third Party Risks Act do not bear this construction.

He contends that of the judgment debts 16 judgments were accepted which should not have been, either because they lacked sufficient particulars to permit identification of the insured, or that they predated 1994 - 12 years before the appointment of the Judicial Manager. In one case judgment was obtained in 2007 - after the appointment of the Judicial Manager. He contends that Goodwill is owed money by other insurers and these needs to be taken into account.

This was not put to the liquidator in cross examination.

It would be inconceivable that the Judicial Manager and then the Liquidator would fail to consider the receivables of Goodwill and to collect these if payable. There is no evidence that he failed to do so. In fact Mr Herde addresses this at paragraph 24 of his affidavit filed July 14 2008 as follows and I accept and prefer his evidence in this regard.

"24. Rejection of claims were made for the following reasons:

(i) The insurance was underwritten after the intervention of the Central Bank of Trinidad and Tobago on 7th March 2006. This matter is dealt with further on in this affidavit.

(ii) Duplication of claims i.e. more than one entity claiming on a particular incident.

(iii) No evidence that the insurance risk was underwritten by the Company.

(iv) Potential liability was statute-barred.

(v) Company's insureds not at fault on an evaluation of the claim*".*

Lambkin contends that he advanced his personal funds to the company and this is inconsistent with carrying on business of the company with intent to defraud creditors or reckless disregard of the company's obligations to pay debts and liabilities or reckless disregard of the insufficiency of the company's assets to satisfy its debts and liabilities**.**

The evidence in support of this is his exhibits to his witness statement JL1 and JL 2 - the balance sheets of another entity Caribbean Design Group. However there is

nothing else to support this, for example no cheques, nor any agreement to repay. The balance sheet of Caribbean Design Group is self serving, with not even a witness statement by the accountant who allegedly certified those accounts as to what underlying documents if any he examined before accepting that entry.

That type of evidence is of negligible weight in the context of a matter as serious as this where the Central Bank and then the court have seen it fit to intervene and investigate. There is no statement as to the source or basis of the accountant's information. There is no documentation whatsoever as to how this money was advanced , what documentation came into being to ensure it could be repaid if needed , what sums comprised the total advanced, for what purpose these sums were advanced, or why such advances would be made . The fact that the company required such alleged advances and its operations continued would have been illustrative of the fact that it was unable to pay its own debts and that Lambkin was aware of this, and is supportive of the liquidator's application.

I do not accept that exhibit as establishing any payment as alleged from Lambkin's personal funds. It is inherently incredible that such sums would be advanced to a company in which both Lambkin and Woodley point out they are not shareholders, and not have such capital injection reflected in the accounts of Goodwill or appropriately documented. The attempt to suggest that the personal architectural practice of Lambkin advanced $500,000 to Goodwill is not accepted.

Neither do I accept as contended that either Woodley or Lambkin is to be commended for not restoring Goodwill to solvency by permitting cash injections from disreputable sources and by not permitting money laundering. Money laundering is illegal. It was simply not even an option for Goodwill.

Cascade land

The attempt to include the Cascade land in the assets comprising the statutory fund of Goodwill even after the property was sold is suspicious and suggestive of an attempt to boost the assets of Goodwill so that it appeared to be less insolvent than it was. If I accept Lambkin's submission with respect to the Cascade land then Goodwill's parent company intended its inclusion in the statutory fund, and its value is significant.

Suriname land

The insistence that land in Suriname be included in its statutory fund for which no deed was provided to show its ownership or even its existence, with the statement of its value initially at $22M and then in the sum of $44 M in the absence of any valuation, is highly suspicious. It suggests at best a level of naiveté in the operation of an insurance company offering motor insurance, which for reasons best illustrated by the instant situation, was subject to even greater regulation for the protection of the public.

If I accept Lambkin's submission with respect to the Suriname land then Goodwill's subsidiary – the alleged owner - intended its inclusion in the statutory fund, and its value is significant.

Having had the benefit of observing Lambkin's demeanour in court and under cross examination, both as the cross examiner and the cross examinee, I am prepared to accept his protestations that he did not intend to defraud anyone and that his own presence and, albeit unsubstantiated, contributions out of personal funds demonstrated this.

I am unable to absolve him from liability on the other limbs of s. 447 as the evidence is compelling. The figures and accounts speak for themselves as well as the correspondence and the attempts to include the Cascade and Suriname lands in the statutory fund. These are clearly illustrative of carrying on business of the company with reckless disregard of the company's obligations to pay debts and liabilities or reckless disregard of the insufficiency of the company's assets to satisfy its debts and liabilities.

I find that on the evidence and applying the legal tests set out above, that Lambkin had the requisite knowledge and state of mind to clearly demonstrate that he carried on business of the company with reckless disregard of the company's obligations to pay debts and liabilities and reckless disregard of the insufficiency of the company's assets to satisfy its debts and liabilities.

Woodley

Woodley filed an affidavit on January 12th 2009**.** It was contended that it should be disregarded as he did not attend trial for cross-examination. In the exercise of my

discretion I am prepared to consider the matters in that affidavit rather than ignore them entirely as Mr Woodley is one of the two directors who were involved in the active management of Goodwill until it went into judicial management. His evidence, untested as it is, must therefore be germane to the issue before me, though I bear in mind that it has been untested by cross examination despite my order for cross examination, and will where necessary determine the appropriate weight to be accorded thereto. He also exhibited relevant documents from the records of Goodwill.

The affidavit of Mr. Woodley was apparently self prepared. He makes the following points therein:

(i) From January to early June 2000 he was a non executive director based in Suriname without direct control of the operations in Goodwill

(ii) He returned to Trinidad in June 2000

(iii) He makes allegations about Mr. Taylor - -and his running of the company, and suggests financial impropriety on his part.

(iv) He dismissed Mr. Taylor by letter dated July 7th 2000.

(v) The Supervisor of Insurance requested on July 14th that Goodwill hand in its licence.

He blames this for the precarious situation the company was in for "the last 5 years".

Paragraphs 10, 11, and 12 of his affidavit are also instructive and are set out below:

> *10. At the time in an attempt to increase the statutory fund* **the company offered the current supervisor (Ms. Margaret Yearwood) a property in Suriname** *which she said she could not accept since Suriname was not a full member of CARICOM at the time.*
>
> *11. It was against all legal advice that Mr. Lambkin and myself decided to stay on Board as it was our main goal to try and save the company and to satisfy the claims that were existing at great sacrifice to us. In some instances we used our own personal funds to satisfy claims and other expenses that normally the company should have paid for.*
>
> *12. The main reason for keeping the company's doors open was to give the company a fair chance to survive and to act responsible rather than put the policy holders at risk. By keeping the doors open it stood a better chance of getting investors to come forward which the board believed firmly would of happen had the company been given* **a small amount** *of time. There were several overseas interests over the years which we brought to the attention of the Supervisor but because of the laws under the Act governing control by a foreign entity it made it difficult to move forward with those proposals. There was one offer on the table just before the winding up action was implemented…but as the judge indicated to me without proof of*

funds from a bank that the potential investor was ready he could not have done anything.

As to his assertion that he was giving the company a fair chance to survive it may be observed that in fact Goodwill had more than a fair chance in that it continued in operation until 2006. However its continued operation in the financial condition it was in put policy holders at risk as well as the general public, any member of whom could have been involved in an accident with a Goodwill policy holder and sustained property damage or personal injury, with recovery being uncertain.

Mr. Woodley, though absent during the trial, filed his submissions on July 14 2009 in reply to those of the liquidator. He contends in summary as follows:

1. The company was insolvent since 1996 - which predated his involvement in Goodwill, which began in 1999. (The record reflects that it actually began in December 1999 so effectively his responsibility, if any, would be from 2000.) He contends that the Central Bank allowed the company to be sold while in an insolvent state to his group, and even went so far as to reissue the license to Goodwill to facilitate the sale. For this conduct, he contends that the Central Bank should be equally called to account, and contends that the Liquidator is asking the court to apply the law in a selective and biased manner.

The evidence however is to a different effect. I accept that the company was insolvent since 1996. The licence of Goodwill was cancelled by the Supervisor on July 14th 2000 but restored in September 2000 after an injunction and an interlocutory order for redelivery of the licence was obtained. This is the evidence of Woodley himself. [Paragraph 6]. The substantive action was never pursued and the action lapsed (paragraph 21 Affidavit of Wendy Ho Sing filed July 14th 2008.)

In addition the Supervisor was warning Goodwill since prior to its sale of its concerns about the solvency of the company and any due diligence by the investors, of whom Mr Woodley was one, must have included investigation of the statutory filings of the Company as well as its last audited accounts. The absence of either would have been an indication that further investigation into the company was required.

In any event, history aside, the matters for which Mr.Woodley and the second group of investors are called to account as present directors, involve the current insolvency position of the company after having the opportunity to rectify it over the period 2000 to 2006, after having collected premiums for that period and after having the company's liabilities and losses continue to increase over that period - thereby putting at risk creditors / policy holders / third party claimants under policies issued by the company .

2. He contends that the court should either find all parties liable including the Central bank or to dismiss the entire matter.

This submission ignores the language of the provision under which the application is being made -The Central Bank would not fall within the purview of that provision. Further, the court's jurisdiction cannot be so limited. I construe s. 447 (1) as permitting and in fact requiring a proper investigation into the conduct of directors or officers made respondents to an application thereunder, and if the evidence allows, after affording such respondents an opportunity to present their version of events, the court may make a declaration, based on its findings, that some, or all, or none of the officers, past or present, are personally responsible for the debts or liabilities of the company.

I do not accept any construction of s.447 (1) which would require a court to dismiss an application under s. 447 (1) unless all parties who could have been responsible for s. 447(1) prohibited conduct are made respondents to the application.

The section permits a declaration of responsibility for part of the debts, obviously attributable to the level of responsibility for the s. 447 (1) conduct attributed to that party by the court.

3. He also contends that the agents or brokers of Goodwill were not joined including a past Claims Manager.

I find that it is the responsibility of management including the directors of Goodwill, to so manage agents, brokers and claims managers as to ensure that a s. 447 (1) situation does not arise. It is obvious that if there were knowledge of wrongdoing by the

management of Goodwill on the part of its servants or agents it was management's duty to address it. The absence of brokers as parties would not either reduce or eliminate any liability of directors if the court were to find the requisite knowledge, intent and culpability on their part.

4. He claims that the liquidator has overstated the liabilities of Goodwill in that the sum of $23,590,738.39 does not represent in its entirety judgement debts obtained against Goodwill and unless a judgement is obtained a claim simpliciter is not a debt. Accordingly the figure is overstated by $11,965,273.80.

Further in relation to Judgments against Goodwill amounting to $11,625,464.59 these are overstated to the extent that if they represent judgements obtained by the insureds of Goodwill, without first proceeding to arbitration, then the insurer is not obligated to pay. This submission is flawed for the following reasons:

a. There is no evidence contradicting the Liquidator's accounts and reports as adopted from those of the Judicial Manager.

b. A judgement of the court must be honoured unless set aside. Any point as to arbitration may be taken prior to judgement being obtained but it is not open to an insurer to simply refuse to pay on a judgement obtained against it.

c. It was open to Mr. Woodley to raise this issue as to which proportion, if any, of the judgements obtained against Goodwill were by insureds against it, as distinct from third parties at trial. This is being raised for the first time in closing submissions.

This submission is therefore rejected.

He also claims that some judgements are for sums in excess of that for which the insurer is liable under the Motor Vehicles (Third Party Risks) Act prior to its latest amendment. One example being a judgment for $1,858,965.90 when the limit of liability at that time was $250,000.00.

It was open to Mr. Woodley to raise this issue at trial and to cross examine the liquidator on this. This is being raised for the first time in closing submissions.

This submission also fails to take into account that the limits of liability under the Motor Vehicles (Third Party Risks) Act may not include interest and costs - see the discussion in the decision of the Privy Council in **Matadeen v Caribbean Insurance Co. Ltd. [2002] UKPC 69.** In the absence of clear cogent and admissible evidence as to the amount if any by which the Liquidator's accounts overstate the liabilities of Goodwill I am unable to accept this submission.

The Suriname land

The attempt to "increase the statutory fund" by inclusion of a property in Suriname.

The Liquidator contends that the Surinam land and the Cascade land (for 2001, 2002, and 2003) were both deliberately included solely for the purpose of fraudulently inflating the asset value of Goodwill so that the company would appear solvent while continuing to write insurance business.

He contends that there was no intent to defraud as" the value stated on the books at that time reflects a share equity held by Goodwill Suriname a registered entity of the company in Suriname" .He claimed that the Directors spent "over $17,000.00 to get a valuation done by an Official Government valuator that worked for the Suriname Government "

The Cascade land

Goodwill purchased this land sometime on 19th September 2000 by Deed Registered as Deed No. 20188 of 2000. On the 28th November 2001 the property was sold to another company. The Deed for the sale by Goodwill is exhibited as **VPH21** to Herde's first affidavit.

He claimed this was purchased by himself and Lambkin out of personal funds, then offered to Goodwill to build the assets of the company to take it out of its insolvent

state, and that when the Central Bank refused to accept it for inclusion in the statutory fund it was then transferred without exchange of funds to the parent company of Goodwill. I find that any issue with respect to the Cascade land could have been resolved with an appropriate acceptable valuation and proof of ownership by Goodwill

No Reinsurance

From as early as July 2000 it is not disputed that the company's reinsurance coverage had ceased

Liquidator contends that **t**he failure of the board of directors to take out reinsurance provision when (i) the company's margin of insolvency was increasing exponentially and (ii) the company was continuing underwriting new business is carrying on business with the intention to defraud creditors under section 447(1) (a).

Woodley addresses the issue in his written submission filed on July 14 2009 admitting this but seeking to justify it. While by itself it may not be sufficient to support a finding intention to defraud, it constitutes yet another element in the overall picture as to how this company was being run.

He contends that the money saved on the reinsurance premium would have been better spent on satisfying claims, and that the Board had taken a "decision not to contract any business in excess of $150,000.00 so that it would minimize the risk per policy in as much as the company was mainly writing motor business". This would appear to be a contradiction of his earlier submission that the earlier statutory limit of liability was

$250,000.00. I have already adverted to the fact that this may be exclusive of interest and costs. Any policy with a limit lower than the statutory limit would appear to have been in breach of the Motor Vehicles Third Party Risks Act and/or to place Goodwill's insured at risk of so being unless he secured additional coverage.

Findings

The submissions of Woodley clearly demonstrate a misunderstanding of the role of the Directors of a company, and lack of recognition of their ultimate responsibility for its management.

They also appear to reflect a misunderstanding of the responsibilities of an insurance company when a judgement is obtained against it as well as the duty of the Insurance Company, for which the directors are ultimately responsible, to so manage such a company as to comply with the directives of the regulator in relation to maintaining appropriate liquidity, solvency, and profitability as to be able to satisfy legitimate claims by insured parties from whom the insurer has accepted premiums in exchange for undertaking the specified risk.

The failure to maintain the solvency of the company and the presiding over the increasing deficits and shortfalls in the statutory fund is not excused by any matter in Woodley's submissions or affidavit. The fact that he claims in submissions to have refused to accept US$2,000,000.00 in cash for the company, while a matter for concern, is not any justification for the failure to effect proper lawful management of the company.

The restoration of its profitability by securing the necessary expertise, the review of its business plan, its pricing structure, its target market, the securing of additional legitimate investment, the restoration of public and potential investor confidence by the production of timely accounts, or the satisfaction of the statutory requirements relating to its statutory filings, and the requirements of the Central Bank in relation of the suitability of sufficient assets for inclusion in the statutory fund., are just some of the issues that could have been given priority in the management of the company over the years from 2000 to 2006.

The evidence is compelling, and the figures and accounts speak for themselves as well as the correspondence and the attempt to include the Cascade and Suriname lands in the statutory fund. This clearly is illustrative of carrying on business of the company with reckless disregard of the company's obligations to pay debts and liabilities or reckless disregard of the insufficiency of the company's assets to satisfy its debts and liabilities. And I so find.

The Liquidator in its skeleton submissions set out to establish the following:

(i) that after Goodwill was purchased by Demerara in 1992, the lucrative aspects of Goodwill were transferred to Demerara. In short, Goodwill was purchased, stripped down and sold off leaving little or nothing behind.

While this has been established I find that the evidence taken as a whole does not establish s. 447 infringement by the first group of directors.

(ii) *Shortly after the sale to Demerara, Goodwill ceased underwriting new long term (life) business and later in 1994 ceased underwriting other new business (fire) leaving only new motor business being underwritten. These are traditionally the more profitable aspects of insurance business.*

While this has been established I find that on the evidence taken as a whole it does not establish s. 447 infringement by the first group of directors.

(iii) *Demerara acquired the life portfolio of Goodwill in December 1996. Thereafter all of Goodwill's business was motor insurance for which Goodwill had a substantial number of policyholders. The effect of which was to put Goodwill in an insolvent position for the first time.*

While this has been established I find that on the evidence taken as a whole it does not establish s. 447 infringement by the first group of directors.

(iv) *The remaining real and substantial asset i.e. its Abercromby Street property was sold to pay off certain debts and liabilities including all Goodwill's debt to Demerara before Goodwill was then sold off.*

While this has been established I find that on the evidence taken as a whole it does not establish s. 447 infringement by the first group of directors.

(v) *Although Goodwill became "less insolvent" in 1998 and 1999 as pointed out by Mr. Tom Yew this improvement was because the remaining real estate of Goodwill was divested and the monies applied to pay claims and debts owed. Hence this improvement could have only been short lived since once the cash* was *expended Goodwill continued on its downward spiral, a fact that would have been appreciated by the First Board.*

While this has been established I find that on the evidence taken as a whole it does not establish. 447 infringement by the first group of directors.

(vi)*Goodwill settled its debt to Demerara (its owner) in priority to other creditors.*

While this has been established I find that on the evidence taken as a whole it does not establish s. 447 infringement by the first group of directors.

(vii)*The First Board failed to seek and obtain a capital injection from Goodwill's shareholders either to increase its asset base or reduce its liabilities.*

While this has been established I find that on the evidence taken as a whole it does not establish s. 447 infringement by the first group of directors.

He contended that:

"all members of the First Board knew or ought to have known that Goodwill was insolvent as at the end of 1996 yet the company continued to operate in the face of increasing claims and an insufficiency of assets to meet debts and liabilities".

While this has been established I find that on the evidence taken as a whole it does not establish s. 447 infringement by the first group of directors.

Further, they failed to take any real steps to improve Goodwill's financial position and in reality there was no hope of same improving. In the circumstances, he asserts that

" the First Board knowingly of Goodwill contrary to Sections 447(l) (a), (b) and (c) or either of them".

While they did *carry on the business* I find that on the evidence taken as a whole it does not establish s. 447 infringement by the first group of directors.

Re disposal of life portfolio and real estate holdings without remuneration

This is not determinative of the issue. It may have marked the beginning of Goodwill's precipitous descent into insolvency or it may have been an attempt to separate the profitable aspects of the business from the unprofitable for valid business reasons.

Re failure to secure capital injection

The first group of directors apparently did not seek such an injection. However they did sell the Abercromby Street property .Whether or not at an undervalue and

whether or not it was a short term solution and whether or not Demerara was favoured when it repaid its debts, it did result in funds being available for creditors.

Re provision of timely accounts

It is unacceptable for an insurance company not to have audited accounts since 2004.

Re Reinsurance arrangements

I find the explanation for lack of such arrangements disingenuous. It is clear this was an attempt to save money by Goodwill but there is no evidence that the money saved benefitted creditors.

Re attempted inclusion of Unsubstantiated Assets in Act accounts

A high degree of suspicion can be attached to the attempt to include the Cascade and Suriname lands as I have found. Attempts to include land in Suriname in the statutory fund without providing a valuation or any evidence of ownership and even to claim an increased value for it suggest accounting too creative to be permissible in an insurance company which is expressly subject to regulatory oversight.

I accept the liquidator's contention that if the land in fact had the value claimed, or if it even existed, then its sale, whether or not it were included in the statutory fund - would have obviated any need for a further capital injection

Re continued operation from 1996 to 2006 in an insolvent state

This is beyond dispute.

CONCLUSIONS

The second group of directors:

I find:

(1) The continued operation of Goodwill from 2000 to 2006 was a sufficiently long period for the new board with the second group of directors to have taken its own actions to reverse Goodwill's financial deficit.

(2) The new board accumulated liabilities and deficits in the course of its own tenure for which the old board could not be held liable.

(3) It is difficult on the evidence to identify the portion of Goodwill's liabilities if any attributable to the first board and any causative link between Goodwill's current liabilities and those at the beginning of 2000 is now tenuous at best.

I find both Woodley and Lambkin were in charge of managing Goodwill from 2000 to 2006, and were largely responsible for its financial condition. They had sufficient time to improve the company's financial condition or to cease operations.

The fact that the directors Lambkin and Woodley were involved with Goodwill since 2000 until the appointment of the Judicial Manager in 2006 cannot be ignored. This would constitute them the longest serving directors apart from Russell and Fields. Unlike Russell and Fields however, Goodwill was statutorily insolvent for the entire duration of their tenure. Also unlike during the tenure of Russell and Fields, no tangible steps were taken to improve the asset base of the company or to reduce its indebtedness. On the evidence it is apparent that Goodwill's ever increasing liabilities were not addressed, putting policy holders and creditors at further risk. The attempt to include the Suriname and Cascade lands as assets in the statutory fund, the obfuscation with respect to the obtaining of new investment in Goodwill, the failure to produce audited accounts after 2004, or to have reinsurance in place, are just some of the matters that demonstrate the state of mind of Lambkin and Woodley. Further they

(a) Continued to run Goodwill with deficits to the Statutory Fund.

(b) Continued to run Goodwill with negative margins of solvency - that is while the company was deemed unable to pay its debts

(c) Promised repeatedly but failed utterly to secure a capital injection.

(d) Sought to include suspect assets in the statutory fund whose value, ownership by Goodwill, or even existence, was never demonstrated, even up to trial.

On Lambkin's and Mr. Woodley's evidence they resisted the temptation for their cash strapped financial institution to allow itself to be used as a conduit for money

laundering despite approaches in this regard. If true this is highly disturbing and points to the need for regulation and even earlier intervention in cases of similar financial non compliance.

I find they both acted with reckless disregard applying the tests I have set out previously, as their conduct amounted at the very least to gross negligence and failure to have regard to the consequences of continued operations on their ability to satisfy creditors claims. Their insistence on inclusion of the Cascade land and the Surinam land could only have been for the purpose of attempting to enhance Goodwill's apparent financial position and to buy it more time to continue trading.

The only remaining issue is whether Woodley also acted fraudulently, that is with intention to defraud, actual dishonesty, real moral blame, or intent to deceive. The distinguishing feature in his case is the attempt to have the Surinam land accepted by the regulator as an admissible asset in the statutory fund. Though unsuccessful, it is conduct that requires an explanation. At the very least the existence of that land should have been demonstrated. Even better the value of that land should have been demonstrated as well as its ownership.

The Cascade land existed but Lambkin, thought it was worth more than it was, and further apparently believed could be included even though it belonged not to Goodwill but to its parent company. This cannot be said about the Surinam land. If it belonged to a subsidiary of Goodwill, and if it was worth even half of its stated value then it could have been available to settle Goodwill's liabilities.

I find that Woodley's attempt to have the Suriname land accepted, the existence and value of which has not been substantiated demonstrates beyond reasonable doubt dishonesty and an intent to deceive.

Findings

I find both Woodley and Lambkin acted with reckless disregard applying the tests I have set out previously, as their conduct amounted at the very least to gross negligence and failure to have regard to the consequences of continued operations on their ability to satisfy creditors' claims. Their insistence on inclusion of the Cascade land and the Surinam land could only have been for the purpose of attempting to enhance Goodwill's apparent financial position and to buy it more time to continue trading.

I find that Woodley knowingly carried on the business with the intent to defraud creditors of Goodwill within the meaning of Section 447(1) (a) by attempting to disclose ownership of a fictitious property in Goodwill's Financial Statements and Act Accounts for the years 2000, 2001, 2002, 2003 and 2004. Up to this point no effort has been made to demonstrate the evidence and value of the Suriname property and this speaks volumes.

I am prepared to give Lambkin the benefit of the doubt that he knowingly carried on the business with the intent to defraud creditors of Goodwill within the meaning of Section 447(1) (a) by continuing to disclose ownership of a parcel of property in Cascade

in Goodwill's Financial Statements and Act Accounts for the years 2001, 2002 and 2003 when Goodwill had already sold the said property.

However I find Lambkin and Woodley knowingly carried on the business of Goodwill between September 2000 and September 2006 with reckless disregard of the insufficiency of the company's assets to satisfy its debts and liabilities and the company's obligation to pay its debts and liabilities pursuant to Section 447(1), (b) and / or (c) .

Quantum

I accept the authorities as well as the submissions cited to me in this regard as follows:-

In **Re Produce Marketing Consortium Ltd**. (1989) 5 BCC 569 Knox J. said,

> *"the jurisdiction is primarily compensatory rather than penal. Prima facie the appropriate amount that a director is declared to be liable to contribute is the amount by which the company's assets can be discerned to have been depleted by the director's conduct which caused the discretion under sec. 214(1) to arise."*

This language has been interpreted as being punitive as well as compensatory in nature. In ***Re a Company No. 001418 of 19988 [1990] BCC 5267***, Bromley J. accepted that the starting point set out by Knox J. but went further, on the basis of the language s. 213 to state that it was in fact also punitive in nature and in fact made a punitive award.

Some of the factors he took into consideration in making a punitive award were firstly that the company's bankers continually expressed concern that he was trading dangerously. – (In the instant case the regulator did so repeatedly).

Secondly there was a large excess of current liabilities over the current assets. (In the instant case the records speak for themselves)

Thirdly, the length of time the fraudulent activity took place for (22 months in that case).(In the instant case the company was run by these directors for six years with steadily increasing deficits beyond the point where it was obvious that its assets were insufficient to meet its liabilities) .

Fourthly, the extent of directors' remuneration.

The first three elements are present here. The extent of the liabilities of Goodwill are such that there will be little real difference between a compensatory and a punitive award in this case in relation to the directors whose conduct I find in breach of s.447.

I take into account the fact that it might be contended that some portion of Goodwill's debts and liabilities stemmed from prior to the sale to directors including Woodley and Lambkin. A review of the accounts as set out earlier in this judgment reveals that this can only be in respect, if at all, of a proportionately minor aspect of the whole. Nevertheless I make some deduction for this possibility. Accordingly I find that

Lambkin and Woodley are personally responsible for the sum of $20,000,000.00 out of the sum of $23,590,738.39 being the debts and liabilities of Goodwill incurred by reason of their conduct.

Disqualification

Directors who persistently infringe statutory obligations are amenable to disqualification. See ***Secretary of State v Arif [1996] BCC 586*** which dealt with the obligations under the Companies Act. This case involves an insurance company which has additional statutory obligations. **S. 447 (4) A** which would reinforce the case for disqualification.

I find in this case that the conduct of both Woodley and Lambkin which I have set out in the course of this judgment, demonstrates clearly the need for the public's protection from any further activities by them as directors. This can be effected by an order that Lambkin and Woodley not be a director in or be directly or indirectly involved in the management of a company incorporated in Trinidad and Tobago, without leave of the Court, for a period of five years from the date of this order. I so order.

Conclusion and Orders

I therefore find as follows:

1. That the Liquidator was entitled to investigate the affairs of Goodwill, and that he had the sanction of the court to do so.
2. The evidence is not sufficient to establish that the first group of directors knowingly carried on the business of Goodwill with reckless disregard of the insufficiency of the company's assets to satisfy its debts and liabilities and the company's obligation to pay its debts and liabilities pursuant to Section 447(1) (b) and (c).
3. The evidence is insufficient to establish that St Cyr knowingly carried on the business of Goodwill with reckless disregard of the insufficiency of the company's assets to satisfy its debts and liabilities and the company's obligation to pay its debts and liabilities pursuant Section 447(1) (b) and (c) or with intent to defraud creditors.
4. The evidence is insufficient to establish that Taylor knowingly carried on the business of Goodwill with reckless disregard of the insufficiency of the company's assets to satisfy its debts and liabilities and the company's obligation to pay its debts and liabilities pursuant to Section 447(1) (b) and (c) or with intent to defraud creditors pursuant to S447 (1) (a) of the Companies Act.
5. However during the tenure of Taylor a company called Goodwill Premium Financing was formed which earned income by apparently financing Goodwill's premiums. This company was formed and controlled by Taylor for his personal profit until control was wrested from him by Woodley. In addition there are

allegations against him by fellow directors relating to invoices submitted to the company and unaccounted income.

6. The evidence establishes that Woodley and Lambkin knowingly carried on the business of Goodwill with reckless disregard of the insufficiency of the company's assets to satisfy its debts and liabilities and the company's obligation to pay its debts and liabilities pursuant to Section 447(1) (b) and (c).
7. The evidence is sufficient to establish that Woodley knowingly carried on the business of Goodwill with intent to defraud creditors pursuant to s 447(1) (a) of the Companies Act.
8. Goodwill had been insolvent since 1996. In the course of its management until the intervention of the Judicial Manager in 2006 several events occurred, each of which conceivably could have impacted on that solvency position and which required investigation.. For example under the tenure of the first group of directors the following occurred - the disposition of the more profitable aspects of Goodwill's business – life and property insurance, the disposition of real property assets associated with its life portfolio, the sale of its headquarters at Abercromby Street, and the possibility that the sale of the latter to its parent company was at an undervalue.
9. With respect to St Cyr his involvement in the company was revealed to have been minimal, having been excluded from the management of the company and having suffered ill health for a significant period of his tenure. In addition St. Cyr's account of his involvement was corroborated by his fellow directors in the course of this investigation and at trial.

10. In addition though I find that the elements of s.447 in relation to the first group of directors as well as Taylor and St. Cyr were not established, I take into account that during the directorship of each, the Company was insolvent since 1996 under the test established under the Insurance Act. In those circumstances, having been satisfied that there was prima facie material in relation to each of these directors that required further investigation I am not inclined in the exercise of my discretion to require the costs of that necessary investigation into these matters to be borne by the Liquidator. Accordingly I make no order as to costs in relation to these respondents.

11. I am prepared to give Lambkin the benefit of the doubt that he knowingly carried on the business with the intent to defraud creditors of Goodwill within the meaning of Section 447(1) (a) by continuing to disclose ownership of a parcel of property in Cascade in Goodwill's Financial Statements and Act Accounts for the years 2001, 2002 and 2003 when Goodwill had already sold the said property.

12. I find that Woodley knowingly carried on the business with the intent to defraud creditors of Goodwill within the meaning of Section 447(1) (a) by attempting to disclose ownership of a fictitious property in Goodwill's Financial Statements and Act Accounts for the years 2000, 2001, 2002, 2003 and 2004.

13. I find Lambkin and Woodley knowingly carried on the business of Goodwill between September 2000 and September 2006 with reckless disregard of the insufficiency of the company's assets to satisfy its debts and liabilities and the company's obligation to pay its debts and liabilities pursuant to Section 447(1), (b) and / or (c) .

14. I find that Lambkin and Woodley are jointly and severally liable for the sum of $20,000,000.00 in respect of Goodwill's outstanding insurance debts and liabilities (out of the sum of $23,590,738.39 being the debts and liabilities of Goodwill) incurred by reason of their conduct.
15. I order that Lambkin not be a director in or be directly or indirectly involved in the management of a company incorporated in Trinidad and Tobago, without leave of the Court, for a period of five years from the date of this order.
16. I order that Woodley not be a director in or be directly or indirectly involved in the management of a company incorporated in Trinidad and Tobago, without leave of the Court, for a period of five years from the date of this order.
17. I order that Lambkin and Woodley do pay to the liquidator his costs of bringing this application certified fit for two counsel
18. I order further that there be liberty to apply.

Finally the court wishes to express its indebtedness to all counsel and their teams for the care with which they conducted meticulous cross examination and elicited evidence, their researches on the relevant law, and their helpful and comprehensive written submissions.

Peter A. Rajkumar
July 30th 2009