REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civil Appeal No. P-227 of 2017
CV2017- 02536

IN THE MATTER OF CL FINANCIAL LIMITED

AND

IN THE MATTER OF THE COMPANIES ACT, CHAP. 81:01

BETWEEN

THE ATTORNEY GENERAL OF THE REPUBLIC OF TRINIDAD AND TOBAGO

Appellant/Petitioner/Applicant

AND

CL FINANCIAL LIMITED

Respondent/Respondent

AND

KIRK CARPENTER
FOR AND ON BEHALF OF THE MAJORITY SHAREHOLDERS OF CL FINANCIAL LIMITED
(NAMELY - CL DUPREY INVESTMENT TRUST LIMITED
DALCO CAPITAL MANAGEMENT COMPANY LIMITED
KIRK CARPENTER
ROGER DUPREY
HAYDEN DUPREY
MARGARITA DUPREY
GLORIA DIAZ
CARROLL SOODEEN
CAROL DE CHIRO
ADRIAN RANDALL SAMPSON
CAMILLE TALMA
LIONEL NURSE
QUENTIN AND PAULA JONES)

Interested Party/Proposed Intervener

DALCO CAPITAL MANAGEMENT COMPANY LIMITED

Respondent/Proposed Intervener

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Appearances:

Mrs. D. Peake SC, Mr. R. Heffes-doon, instructed by Mr. R. Thomas on behalf of the appellant

Mr. B. Reid, instructed by Ms. S. Tyson on behalf of the respondent

Mr. J. Jeremie SC, Ms. R. Caesar, instructed by Mr. J. Kelly on behalf of Mr. K. Carpenter and United Shareholders Limited

Mrs. L. Maharaj SC, holding for Mr. R. L. Maharaj SC (abs),

Mr. R. Bissessar instructed by Mr. V. Gopaul-Gosine on behalf of Dalco Capital Management Ltd

Panel: Justice of Appeal Rajkumar
Justice of Appeal Pemberton
Justice of Appeal des Vignes

Date of delivery: August 8th 2017

I have read the written reasons of Rajkumar J.A and I agree with them.

Charmaine Pemberton
Justice of Appeal

I also agree.
Andre des Vignes
Justice of Appeal

Reasons for decision

Delivered by P. Rajkumar J.A.

On July 25th 2017 our oral judgement was delivered with more extensive written reasons to follow. These are now set out hereunder.

Background

1. The appellant filed an application to wind up the respondent company (**CLF**). It also sought the appointment of a provisional liquidator in circumstances where it alleged:

   a. that the company was unable to pay its debts and should be wound up,

   b. that its assets needed to be protected and conserved pending the determination of the winding up petition, and

   c. that a change was contemplated in the composition and control of the board of directors of CLF (the board), contrary to the basis on which substantial sums, allegedly in excess of $23 billion, had been advanced by the appellant.

2. The trial judge refused to appoint a provisional liquidator and held that the application to do so was premature. That decision is the subject of this appeal.

Issue

3. Whether the trial was judge was plainly wrong in the exercise of his discretion not to appoint joint provisional liquidators.

Conclusion

4. The trial judge was plainly wrong:-

a. in misconstruing the evidence, and

b. in not applying the correct legal test (which he had accepted as correct), in relation to dissipation of assets, (a consideration relevant to the appointment of provisional liquidators).

5. More particularly, the trial judge fell into error in:-

i. failing to consider the **totality of the evidence** before him of the company's current financial position;

ii. in selecting **one aspect** of that evidence, (the operational loss for 2017), to the exclusion of the **totality** of that evidence;

iii. in misconstruing the effect of the evidence that he did consider;

iv. in failing, (despite referring to it), to apply the correct meaning of "*dissipation"* of assets (in relation to a company continuing to trade after presentation of a winding up petition;

v. in applying instead a test for "*dissipation* "based on the Concise Oxford Dictionary meaning (*to waste*); and a further test that a *serious effect* on the assets of the company needed to be demonstrated by the applicant ;

vi. in ignoring his own finding as to what was the correct legal meaning of "*dissipation"*;

vii. in any event, in failing to consider and properly apply to the particular current circumstances of CLF any of the tests that he referred to in relation to dissipation of assets, leading to the erroneous conclusion that it was premature in the circumstances to appoint joint provisional liquidators.

Totality of the evidence

6. a. the evidence derived from the company's management accounts is that even before the claimed liability to the Government and taxpayers of $15 billion is taken into account, as at April 2017:-

i. its **current** liabilities exceed its **current** assets, (by $4.185 billion – an increase from December 2015),

ii. its **current** liabilities exceed its **total** assets (by $659 million – an increase from December 2015), and

iii. its **total** liabilities exceed its **total** assets, (by $ 3.396 billion – an increase from December 2015).

b. It is common ground that there has been a long term insolvency of CLF since 2009,

c. The trial judge considered that the company was in that scenario up to April 2017 operating at an average monthly loss of at least $900,000.00, (even assuming that figure to be correctly interpreted). However he held that in the context of the entire asset base of CLF this was not an excessive amount. He failed thereby to take into account the evidence above, as well as other figures in that balance sheet that he referred to, for example the actual loss for the same period after taxation. He failed to appreciate therefore that the losses that he identified, or any losses at all, were in the context of assets which were already **fully exceeded by liabilities**, and continued operation would have the effect of continuing to further erode those assets.

7. In those circumstances his evaluation of the evidence was plainly wrong. Further the application to the evidence of a requirement:-

a. to establish that the company was dissipating its assets in the sense of **wasting** assets, or,

b. that it be demonstrated that day to day operations of CLF would have a **serious effect** on the assets of the company as a precondition to be satisfied before the appointment of provisional liquidators,

were both plainly wrong.

8. In those circumstances the refusal to appoint joint provisional liquidators is therefore reviewable by an appellate court.

9. Further for the very reasons identified above, namely, that on the evidence the continued operation of CLF is prima facie dissipating its assets, in the sense that term is used in law, it is necessary, and in the public interest, that joint provisional liquidators be appointed with immediate effect to protect and conserve the assets available for all CLF's creditors, including the applicant.

Order

10. After consultation with all parties an order was entered (though not by consent) in the following terms:

1. The appeal is allowed and the order of the Honourable Mr. Justice Ramcharan dated 19 July 2017 is set aside;

2. Pursuant to section 370 of the Companies Act, Chap. 81:01 and Rule 24 of the Companies

Winding Up Rules Mr. Hugh Dickson and Mr. Marcus Wide of the international accounting firm Grant Thornton are appointed Joint Provisional Liquidators in relation to CL Financial Limited ("**CLF**" or "the **Company**") in order to protect and conserve the assets of CLF and curtail wasteful expenditure and liabilities pending the determination of the winding up petition, and that the powers of the Joint Provisional Liquidators be limited and restricted to the following acts, which may be done by each of them individually:-

a. power to take into possession, and collect in the assets (of whatever nature) to which CLF is or appears to be entitled, including the books and records of CLF;

b. power to do all things which may be necessary or expedient for the protection of CLF's assets whether in this or any other jurisdiction;

c. power to investigate the affairs of CLF;

d. power to bring, continue or defend any action or other legal proceedings on behalf of CLF in this or any other jurisdiction including (without limitation) power to commence such actions for the protection and/or for the recovery of documents or assets as may be required and to seek appropriate interlocutory relief;

e. power to employ such professional advisers as may be necessary to assist them in the performance of their duties;

f. power to appoint an agent to do any business which they are unable to do themselves or which can more conveniently be done by an agent;

g. power to retain and operate the existing bank accounts of CLF and to open and operate new accounts and to pay any necessary expenses incurred on

behalf of CLF in carrying out their powers and duties from such accounts;

h. power to enter into or terminate any contracts or transactions relating to CLF as may be necessary;

i. power to sell, distribute, part with or otherwise dispose of the assets of CLF **with the approval of the court**;

j. power to make any arrangement or compromise on behalf of CLF with the approval of the court;

k. power to retain, dismiss or otherwise deal with employees **of CLF** as may be necessary;

l. Other than as provided for at paragraph (i), power to deal with real property of CLF of all kinds including leases as may be necessary;

m. power to maintain insurances;

n. (power to) make a proposal under the Bankruptcy and Insolvency Act, Chap. 9.70 on behalf of CLF;

o. power to do all other things reasonably and properly incidental to the performance of the foregoing functions and powers; and

p. power to apply for further relief or directions from the court.

3. That within twenty-one (21) days from the date hereof, CLF do make out and submit to the Joint Provisional Liquidators a statement as to the affairs of the Company verified by affidavit and showing particulars of the assets, debts and liabilities of the Company, the names residences and occupations of its creditors, the securities held by them respectively, the dates when the securities were respectively given and such

further or other information as the Joint Provisional Liquidators may require.

The statement shall be submitted and verified by one or more of the persons who are at the date hereof the directors and by the person who is at that date hereof the secretary of the Company, or by such of the persons hereinafter mentioned as the Joint Provisional Liquidators, subject to the direction of the Court, may require to submit and verify the statement, that is to say, persons—

(a) who are or have been officers, other than employees, of the Company;

(b) who have taken part in the formation of the Company at any time within one year before the relevant date;

(c) who are in the employment of the Company, or have been in the employment of the Company within that year, and are in the opinion of the Joint Provisional Liquidators capable of giving the information required; and

(d) who are or have been within that year officers of or in the employment of a Company, which is, or within that year was, an officer of the Company to which the statement relates;

4. That the reasonable costs of and expenses incurred by the Joint Provisional Liquidators pursuant to this Order be borne by CLF, subject to the Court's approval.

5. That the Joint Provisional Liquidators do file with the Court considering the winding up petition and serve on all the parties appearing before the Court today accounts of such costs and expenses incurred every three (3) months commencing on the first working day of

November 2017 and continuing thereafter until further order.

6. (That) The interested parties do pay the costs of the Appellant to be taxed in default of agreement certified fit for Senior and Junior Counsel.

NOTE: It will be the duty of such of the persons as are liable to make out or to concur in making out a Statement of Affairs as the Joint Provisional Liquidators may require and to attend on the Joint Provisional Liquidators at such time and place as they may appoint and to give them all information they may require.

Analysis

Background – the agreements

11. On January 30th, 2009, a Memorandum of Understanding (MOU) was entered into between CLF and the Government of Trinidad and Tobago (GORTT or the government)). On 12th June 2009, the original Shareholders Agreement (OSA or SA) was entered into between CLF, Directors of CLF and the Majority Shareholders of CLF on the one hand, and the Government of Trinidad and Tobago on the other. Based thereon, the Government agreed to provide financial support for CLF.

12. The control of the Board of Directors (the Board) was also provided for in that agreement. This was to be for a period of three years with the majority control of the Board by the Government. This was to be effected by the appointment/ nomination of a majority on the Board of four Government Directors. The Majority Shareholders would have three Directors and the Chairman of

the Board was to have a casting vote. That Chairman was to be appointed from the Directors nominated by the Government.

Financial support

13. Pursuant to the agreement for financial support, the Government claimed to have provided in excess of TT $ 23 billion dollars. The exact figure, to the extent that one can be exact about these figures, in fact, is 23 billion, 95 million, three hundred and eighty-seven thousand, eight hundred and forty-one dollars ($23,095,387,841.00). This figure excluded legal and advisory fees, interest, and other costs. As recognised in the MOU this sum was advanced in order to avoid disruption and damage to the financial system (and economy) of Trinidad and Tobago.

Non-extension of the Shareholders Agreement

14. The original shareholders agreement was for a period of three years, although it provided for termination before that period had expired if the sums advanced had been repaid. However that arrangement did not result in the repayment within three years of the sums extended by the Government. The agreement was, therefore, extended for six-month periods. It has now been extended 17 times. The last extension was to August 2016, and the Majority Shareholders have declined to extend it thereafter.

Sums allegedly owed to GORTT

15. To date, the sum of seven billion, four hundred and eighty-six million, three hundred and fifty-four thousand, one hundred and eighty-seven dollars ($7,486,354,187.00) has been repaid, and the Government claims that a sum in excess of fifteen billion dollars ($15,000,000,000) continues

to be owed. The actual sum claimed is fifteen billion, six hundred and nine million and thirty-three thousand dollars, six hundred and fifty-four dollars ($15,609,033,654). These sums are all significant and substantial.

Requisition seeking to change Board Composition

16. Despite the failure to execute an extension of the shareholders' agreement, the majority of Directors continued to be Government appointed, and the Government thereby remained in control of the Board. **On 22nd June, 2017**, the non-Government Shareholders indicated an intention to requisition a special general meeting for the purpose of appointing two additional non-Government Directors. This would have had the effect of having a Board now composed of a majority of non-Government nominated Directors.

Winding up petition / application to appoint provisional liquidators

17. The Government then filed:-

a. firstly, a petition for the winding up of the company, CLF, which is still pending before the trial Judge. (The winding up petition is presented on the bases that i. the company is unable to pay its debts and, ii. that it is just and equitable that it be wound up).

b. secondly, an application for the appointment of joint provisional liquidators. This latter application was heard before the trial Judge who dismissed it as premature. It is that decision that is appealed to this Court.

Current financial position

18. The company's last financial statement shows that as at April 30th 2017:-

i. its **current** liabilities exceed its **current** assets, (by $4.185 billion – an increase from December 2015),

ii. its **current** liabilities exceed its **total** assets (by $659 million – an increase from December 2015), and

iii. its **total** liabilities exceed its **total** assets, (by $ 3.396 billion – an increase from December 2015).

19. This is the evidence of Mr. Soo Ping Chow, and this is the evidence that was before the Trial Judge. For example, he states at **"***18. CLF's 2017 Management Accounts record* ***Current Liabilities exceeding Current Assets by approximately TT$4.2 billion****. This excess of Current Liabilities over Current Assets indicates that* ***CLF does not have the ability to meet its debts as they fall due, from the cash and other assets which can be readily realisable****. The reported working capital deficiency has increased by TT$1.3 billion from TT$2.9 billion as at 31 December 2015 to* ***TT$4.2 billion*** *as at 30 April 2017."* (all emphasis added)

Indebtedness to the Government and taxpayers

20. It is not disputed that the company's liability to the Government to repay financial support that it received is well in excess of 10 billion dollars ($10,000,000,000). It is actually in excess of 12 billion dollars ($12,000,000,000) depending upon the source of figures selected. For example, by the 17th extension to the Shareholders Agreement, dated 9th June 2016, United Shareholders Group (USG), on behalf of shareholders, acknowledged expenditure by the Government of Trinidad and Tobago of nineteen billion, two hundred and sixty-six million dollars ($19,266,000,000), with

an estimated additional amount of financial support of three billion, three hundred and ninety-eight million dollars ($3,398,000,000) being required.

21. The draft proposal for "Project Rebirth" - a proposal commissioned by the majority shareholders and presented by accounting firm PWC, recites the sums advanced as $22.4 billion[1]. This figure was accepted by USG in letter dated June 2nd 2017 from their attorneys at law[2].

Urgency

22. It is not in dispute that it was the clear intention of the Shareholders to regain control of the Board of Directors from the Government at the meeting set to begin initially at 3:30 p.m. on Tuesday July 25th 2017[3]. Upon enquiry at a status hearing convened on receipt of the application to deem the appeal urgent, we were informed,(by attorneys at law for the majority shareholders who had requisitioned the meeting), that there was no flexibility with respect to its date. Hence the urgency alleged by the appellant - the potential for the change in control of the company at a meeting requisitioned by 63.7 per cent of the shareholding of the company, in the face of a winding-up petition in respect of CLF, whose claimed indebtedness to the Government and taxpayers alone remains in excess of fifteen billion dollars ($15,000,000,000) after eight years.

23. An undertaking was given in the course of this hearing on July 25th 2017 to the effect that the purpose of the requisition to appoint Messrs. Reis and Carpenter would be put on hold, and they would not hold themselves out for election to the Board, until October 31st, 2017. However, the

[1] and not $24 billion as stated in our oral judgement
[2] page 304 record of appeal
[3] page 305 RoA

underlying factors which have led to this winding-up petition and the application for the appointment of joint provisional liquidators remain, namely,

i. the non-extension of the Shareholders Agreement, and refusal by the Majority Shareholders to do so (see letter from JD Sellier dated June 16th 2017 –page 317 RoA);

ii. the **continued intention** by the Majority Shareholders to obtain a majority position on the Board of directors of CLF, as evinced by a letter from JD Sellier dated June 2nd 2017, (though temporarily suspended, on the day of hearing of this appeal, until October 31st 2017);

iii. the continued indebtedness of CLF, with the company's financial position being such that, even without taking into account the alleged debt to Government and taxpayers, it is unlikely to be able to repay its debts.

24. Further, it was contended that other shareholders holding 5 % of the issued shares of the company, who had not been parties to the undertaking being belatedly offered, could present a similar requisition, and seek once again to change the composition of the Board, pursuant to the intention clearly expressed in the Sellier letter. This would lead once again to a repetition of the instant situation.

25. While the initial urgency of the application was occasioned by the looming shareholders meeting for the purpose of altering the composition and control of the board of directors of CLF, the underlying factors revealed in the management accounts of CLF itself demonstrate that the situation of insolvency was both long term and deteriorating.

26. The Government appears, by its actions, to have been prepared, despite CLF's substantial indebtedness since 2009 to allow the company to trade its way out of this situation and eventually repay the debt, while the Government remained in control of the Board by its majority thereon and the casting vote of its nominated Chairman. This cannot mean that the appellant is precluded by its knowledge of the insolvency and its attempts to rectify it from applying for the appointment of joint provisional liquidators .This is a situation which the appellant appears not content with if majority control of the Board were to pass to the Majority Shareholders. The court's intervention was sought in circumstances where i. control of the Board by the appellant appeared to be about to change and ii. it had become clear that that this was being pursued even though CLF had not repaid the majority of its debt after operating for 8 years.

27. Much was made of the fact that while management accounts were available, audited financial statements were not. However the Majority Shareholders have had 3 directors on the Board since the OSA in 2009. The management accounts are accounts of the company. In the absence of audited financial statements, they are prima facie evidence of the matters set out therein. They showed cash flow insolvency and inability to pay debts as even its **current liabilities exceeded** both its current assets and **total assets**.

28. Under the Trinidad and Tobago Companies Act s. 356 (1) (c) a company is deemed to be unable to pay its debts:

> ***356.*** *(1) A company is deemed to be unable to pay its debts if—*
> *(c) it is proved to the satisfaction of the Court that the company is unable to pay its debts, and, in determining whether a company is unable to pay its debts,* ***the Court shall take into account the contingent and prospective liabilities of the company****.*

29. This is similar[4] to the test in s. 123 (1) (e) of the UK Insolvency Act 1986 which **Goode-Principles of Corporate Insolvency** at para 4-05 refers to as a test of **cash flow or commercial insolvency**[5]:

The cash flow or commercial insolvency test

> *"Under the cash flow or commercial insolvency test a company is insolvent when it is unable to pay its debts as they fall due. For this purpose, the fact that its assets exceed its liabilities is irrelevant; if it cannot pay its way in the conduct of its business it is insolvent, for there is no reason why creditors should be expected to wait while the company realizes assets, some of which may not be held in readily liquidated form."*

30. Therefore even if CLF's assets had exceeded its liabilities it could have been commercially insolvent on this test if it could not pay its debts as they fall due. However CLF's position was even worse than this as its **total** assets **did not exceed** its liabilities. Therefore, on the cash flow test as well as on the balance sheet test, CLF is unable to pay its debts.

31. It would be obviously desirable for CLF to have traded its way out of debt and repaid creditors out of profits and realisation of assets as appropriate. However this situation had been ongoing since 2009, coupled with a threat to alter control of the Board, (even if reluctantly postponed to October 31st 2017 in the course of hearing of this appeal).

32. The trial judge failed to appreciate on the evidence that the situation was obviously unsustainable, and failed to appreciate that, as a matter of law, CLF's continuing to trade was itself a dissipation of assets in law, not in the Mareva sense, or the dictionary sense, but in the legal sense, based on the law that he had himself accepted as correct.

[4] the difference- underlined- is not material in this case
[5] Page 634 of the RoA

33. It was in those circumstances that we delivered our reasons orally for deeming urgent the appeal in relation to the refusal of the application to appoint a provisional liquidator, and proceeded to hear it.

The two stage test

34. The trial judge set out the law correctly at paragraph 9 of the written judgement when he observed that there is a two (2) stage test for the appointment of a provisional liquidator as follows:- (i) whether it is **likely** that a winding up order will be made and (ii) whether (in the circumstances), it is right that a provisional liquidator be appointed[6].

35. The trial Judge found that it was **highly likely** that the Winding-up Order would be made, though he recognised the possibility that it could be affected by further evidence. In the face of the uncontested or undisputed evidence of indebtedness to the Government of billions of dollars, whether **fifteen billion as claimed**, or twelve billion – (over **nineteen billion** ($19,266,000,000), as accepted by the shareholders in the **recitals in** the last extension to the Shareholders Agreement (as at that time), **less** over **seven** billion repaid).

36. Given that a statutory demand could be served on a company for any claim over $5000.00 under section 356 (1) (a) of the Companies Act, and if unsatisfied after 3 weeks, the company would

[6]see **Commissioners for Her Majesty's Revenue and Customs v Rochdale Drinks Distributors Ltd** [2011] EWCA Civ 116 (**Rochdale**)– specifically paragraph76-77, and generally 75-83

be deemed unable to pay its debts, we would agree with that finding that it was **highly likely** that the Winding-up Order would be made.

Whether grounds justifying reversal of the refusal to appoint Joint Provisional Liquidators

37. The issue is whether the trial Judge has been shown to be plainly wrong in the exercise of his discretion to decline to appoint joint provisional liquidators. It was contended that he correctly appreciated:-

i. that the appointment of a provisional liquidator is a drastic intrusion into the affairs of a company;

ii. that it would not be done if other measures would be **adequate to preserve the status quo**, and

iii. that the Applicant/Appellant must show some good reason for intervention prior to the hearing of the final winding-up petition[7].

iv. that he correctly appreciated that what the Court had to consider was a dissipation of assets, so that they are not available for the use of the creditors, and that the dissipation of assets is not limited to what is considered dissipation of assets in the granting of a freezing order[8].

v. that he appreciated that even day-to-day operations can be taken into account. (paragraph 13 of the judgment)

[7] paragraph 14 **Australian Securities and Investments Commission v ActiveSuper PtyLtd (No. 2) [2013] FCA 234**

[8] see also paragraph 99 of **Rochdale** infra

Application of the law – dissipation of assets

38. However, he then went on to use the *Concise Oxford Dictionary* definition of "to dissipate" with respect to money, and its meaning there as "to waste" and he applied that test, rather than the test in law which he had previously accepted represented what dissipation actually meant in law, namely "*dissipation of assets, so that they are not available for the use of the creditors"*.

39. He also considered another variant on the test for dissipation, again inconsistent with the authorities that he appeared to have relied upon, namely, that a *serious effect* on the assets of the company by its operation needed to be demonstrated[9].

40. He then proceeded to consider that "*if it were the case that **simply operating** the business, regardless of the cost of such operation, were **a dissipation of assets**, it would be in virtually every case that the criteria for appointing a Provisional Liquidator would be met"*[10].

41. It was contended on behalf of the interested parties that to the extent that reference was made to the Concise Oxford Dictionary this should be treated as *obiter dicta* and ignored, because fundamentally, the judge having referred to and therefore appreciated the correct test, his application of it was a matter for his discretion.

42. However it is clear that the court did not in fact apply the correct test, and that the reference to the test in the Oxford dictionary was in support of its reasoning that *to dissipate* means *to waste*,

[9] *only be appropriate where the day to day operations of the Company will have a **serious effect** on the assets of the Company*
[10] Page 3 of the Notes of Oral Decision

and in support of the observation that *"if it were the case that simply operating the business, regardless as to the cost of such operation were dissipation of assets, it would be virtually in every case that the criteria for appointing PL (Provisional Liquidator) would be met".*

43. Where the Trial Judge can be considered to have been plainly wrong is in creating new definitions of "*dissipate"* and thereby imposing on the applicant an onus of proof higher than that required by existing law, in contradiction to the legal test which he himself had previously accepted. Further the adoption of a test which limits the circumstances of the appointment of a provisional liquidator (PL) to cases where the day to day operations of an **insolvent** company will have a "serious effect" on assets is plainly wrong, and inconsistent with **Rochdale** – a case on which he relied.

44. The UK Court of Appeal noted at para 99 of **Commissioners for Her Majesty's Revenue and Customs v Rochdale Drinks Distributors Ltd** [2011] EWCA Civ 116 (**Rochdale**) (cited by the court) (all emphasis added) :

"…it includes any serious risk that the assets may not continue to be available to the company (see *Re a company (No 003102 of 1991), ex parte Nyckeln Finance Co Ltd* [1991] BCLC 539, at 542, per Harman J). **I consider that Harman J probably had in mind the type of case in which, despite the presentation of a petition, an apparently insolvent and loss-making company simply continues to trade…**"

45. The trial judge failed to appreciate that the evidence before him was of precisely that: - an apparently insolvent and loss-making company simply continuing to trade, and thereby continuing

to dissipate its assets, if provisional liquidators were not appointed. The trial judge himself accepted that on CLF's own management accounts CLF was in fact currently making an **average monthly loss** of $900,000.00[11].

46. Further even if the figure relied upon is actually $900,000.00 per month, this figure is over $10 Million per year. This cannot be considered an insignificant or insubstantial sum, more so when the totality of the company's assets are already **exceeded by** its **current liabilities** as well as by its **total liabilities**, even without taking the claimed $15 billion debt into consideration.

47. On the evidence that was before the court CLF was increasing its losses monthly. Yet in the normal course of things it would still be liable to repay these accruing losses, in addition to its already existing **current** liabilities. However this was in a context where there were already insufficient assets available to settle its already existing **current** liabilities. Moreover, this was the case even without taking into account the **total** liabilities of this company.

48. Even on the trial court's own reasoning, that an order, (for the appointment of a provisional liquidator), *"would be only appropriate where the day-to-day operations of the Company would have **a serious effect on the assets** of the Company",* it failed to appreciate that even an ongoing average monthly loss of $900,000.00 (even assuming that the figure he referred to were even accurate) represented an accruing annual loss of over $10 million. This was a significant sum in its

[11] Whether that figure was correctly interpreted makes little difference to the principle, given that for that period apart from CLF making an operational loss it was also making a **loss** before and after taxation

own right, which it is self-evident, must have a serious effect on the assets of the company. This is even more so when those assets were already exceeded by its existing current liabilities as well as its total and contingent liabilities, and furthermore was the case even without taking into account the claimed $15 billion debt to the appellant and the taxpayers it represents.

49. The court's further reasoning *"if it were the case that **simply operating** the business, regardless as to the cost of such operation were dissipation of assets, it would be virtually in every case that the criteria for appointing PL (Provisional Liquidator) would be met"* also cannot withstand scrutiny. This was not the case before the court. It was not CLF's "***simply operating a business"*** which gave rise to contention that there was a danger of *dissipation of assets*, justifying the application to appoint provisional liquidators. Rather it was the continued operation of that business when, on the trial judge's own reasoning, it had been demonstrated on the management accounts that as at April 30th 2017 that company was operating at a loss **and** that its assets were **already** less than its liabilities, both current and total. And this was so even without taking into account the claimed $15 billion debt.

50. Therefore it could not possibly be said that continued accumulation of losses from CLF's operations in such a situation was not a dissipation of its assets. Further, that monthly loss could not be glossed over by any comparison of the monthly loss as a proportion of CLF's total assets without taking into account that all of CLF's assets were **already** far **outweighed by its liabilities**, both current and total.

51. Even the application of those erroneous tests ignores the evidence of exactly such a serious effect. The continued operation of this insolvent company, in a manner that involves the expenditure of its funds, did involve a serious risk that its assets may not be available to the company to liquidate its debts[12]. It was dissipating the monies, which are already inadequate to satisfy its debts, (using the figure that the trial court relied upon), at a rate of $900,000.00 per month.

52. This was therefore inconsistent with the court's own reasoning (in addition to being wrong in law), as on the evidence there was a dissipation of assets by CLF's **accruing monthly operating losses**, and it was established thereby that continued operation was having a **serious effect** on CLF's assets.

53. Further in his observation that "*if it were the case that simply operating the business, regardless of the costs of such operation, were dissipation of assets, it would be in virtually every case that the criteria for appointing a Provisional Liquidator would be met"*, the court failed to appreciate that each case for appointment of a provisional liquidator is fact specific[13].

[12] Per Rimer LJ in **Rochdale** para 99

[13] The decision to appoint a PL is fact specific. In **Australian Securities and Investments Commission v ActiveSuper PtyLtd (No. 2) [2013] FCA 234** the Federal Court of Australia stated as follows (all emphasis added) :

> *11. Section 472(2) of the Act gives the Court power to appoint a provisional liquidator at any time after the filing of a winding up application and before the making of a winding up order.* ***The Court has a wide and complete discretion whether or not to appoint a provisional liquidator: Re Huntford Pty Ltd (1993) 12 ACSR 274 at 277.***
>
> *12. The matter was explained in Re New Cap Reinsurance Corporation Holdings Ltd (1999) 32 ACSR 234 at [23]:*

... As was said in Re McLennan Holdings Pty Ltd [(1983) 7 ACLR 732] at p 738 and affirmed by the Court of Appeal in Constantinidis, ***the power to appoint a provisional liquidator*** *is by* ***no means limited****, the* ***grounds*** *on which a provisional liquidator may be appointed are* ***infinite****, and all that really has to be shown is that there is a bona fide application constituting* ***sufficient ground for the making of the order****.*

54. The facts in this case before the court were that CLF was making a loss as at April 30th 2017, as well as an operational loss. It was a substantial loss, and an unsustainable one. This was so regardless of the proportion that it bore to total assets, as the evidence before the court was that those assets were exceeded by both current liabilities and by total liabilities, and this was even before the prospective liability of the appellant's claim for $15 Billion was taken into account.

55. Therefore the evidence before the trial judge, which he himself cited as supportive of a discretion not to appoint joint provisional liquidators, in fact did not support such exercise of discretion. The evidence that he cited demonstrated rather that the company was continually accruing **losses** at a rate that was unsustainable, as already it could not pay its existing debts, far less any accruing debts, whether at the rate of $900,000.00 per month or in fact at any rate.

56. The trial court was plainly wrong in its assessment of the evidence before it. The evidence cited demonstrated rather that as at April 30th 2017 the company was continuing to accrue losses at a rate that was unsustainable as already it had insufficient assets to satisfy its existing liabilities. In those circumstances it could not afford the luxury of continuing to accrue further liabilities at the rate of $900,000.00 per month.

57. The isolation of a single figure in the accounts and reliance thereon to support the conclusion that there was no dissipation of assets from its operation, which in fact demonstrated the very opposite, is another basis for finding that the trial judge was plainly wrong in his appreciation of the evidence before him.

58. The court expressed the conclusion that "*that there is no evidence or no sufficient evidence* ***that if the shareholders are successful in changing the composition of the Board, that they will operate in a manner that will be to the detriment of the creditors of CLF***." However the evidence was that the very operation of CLF had become detrimental to the creditors of CLF as its assets were being dissipated in the proper legal sense of the term.

The totality of the evidence

59. The trial judge also failed to consider the totality of the evidence in not appreciating the distinguishing factors which make this different from the normal case where a winding-up petition has been presented. These included:-

i. the refusal to renew the original Shareholders Agreement, which was the basis on which the Government had advanced over $23 billion of taxpayers funds in support;

ii. the requisition to appoint additional Directors to change the control of the Board from the Government, contrary to the original Shareholders Agreement;

iii. the persistence in the intention to appoint those Directors while a winding-up petition is being heard by the Courts, (even if that intention was later postponed at the hearing of this appeal to October 31st, 2017);

iv. the fact that any intention to repay by the majority shareholders, to which the trial court referred as existing on paper, does nothing to actually satisfy the debt, in the face of the prima facie evidence before the court from CLF's own management accounts of inability to pay its debts;

v. the fact that CLF has been trading since 2009, yet continues to be indebted to the extent of up to approximately $15 billion dollars.

vi. the fact that as at April 30th 2017 CLF had been making an average monthly operational loss.

That distinguishes this matter from others, where simply a winding-up petition has been presented.

Conclusion on misconstruing the evidence

60. Therefore in addition to i. applying a meaning of *dissipate* different from the one which it accepted was correct in law, the trial court:-

ii. failed to appreciate the **totality of the evidence** and the matters which were specific to this fact specific matter.

iii. failed to appreciate the **general evidence of indebtedness** – which was before the court on the affidavit of Colin Soo Ping Chow.

iv. instead relied on a single isolated figure in the accounts – $3,509,000. However it failed to appreciate the significance even of this single figure isolated from the accounts upon which it purported to rely, as even that figure establishes and illustrates that the company continues to operate at a monthly loss. The reasoning that that rate of loss, ($900,000.00 monthly as at April 2017, even if accurate), is insignificant in relation to total assets, ignores the fact that total assets are already exceeded by both total liabilities and current liabilities.

61. In the circumstances the trial Judge failed to appreciate the entirety of the evidence before him, misapplied the second stage of the applicable legal test, and failed, in particular, to appreciate that CLF's continuing to trade itself, on the evidence, was resulting in the continued dissipation of its assets.

62. It is clear that the trial Judge was sufficiently plainly wrong in his misapprehension of the evidence, and misapplication of the test for dissipation of assets, as to justify revisiting his Order. Based on the errors of the trial court with regard to both law and fact we are satisfied that it would be appropriate to set aside its decision and revisit it.

Revisiting the issue of appointment of provisional liquidators

63. Section 370 of the Companies Act provides for the appointment of a Provisional Liquidator as follows (all emphasis added):

> *"370. (1) Subject to the provisions of this section, the Court may appoint a liquidator provisionally at any time after the presentation of a winding up petition, and either the Official Receiver or any other fit person may be appointed.*
>
> *(2) Where a liquidator is provisionally appointed by the Court, the Court* ***may limit and restrict his powers by the order appointing him****."*
>
> *Additionally, Rule 24 of the Companies Winding-Up Rules provides as follows:*
> *"24. (1) After the presentation of a petition, upon the application of a creditor, or of a contributory, or of the company, and upon proof by affidavit of sufficient ground for the appointment of a Provisional Liquidator, the Court, if it thinks fit and* ***upon such terms as in the opinion of the Court shall be just and necessary,*** *may make the appointment."*

> **In Halsbury's** Vol. 7(3) (4th ed.) 2004 reissue paragraph 491 it is noted (all emphasis added):
> *"The Court may appoint a Provisional Liquidator* ***to take possession of and protect the company's assets*** *at any time after the presentation of the winding up petition...The provisional liquidator must* ***carry out such functions as the court may confer on him****.*

When a Provisional Liquidator is appointed his power may be limited by the order appointing him (See also footnote 3) [14]*."*

Dissipation

64. In **Re a company (No 003102 of 1991) ex parte Nyckeln Finance Co.** [1991] BCLC 539, Harman J explained the concept of dissipation in this sense at page 542b[15] (all emphasis added):

> "If there is a risk of assets being **dissipated** – that is made away with **other than by the rateable distribution amongst all the company's creditors at the date of presentation of the winding up petition** – there **must be a good case for the court appointing its own officers, for that is what provisional liquidators are**, to try to get in and secure the assets so that if, at the end of the day, the company is put into compulsory liquidation, as in this case at present appears reasonably likely, then there will be assets available and they will not have been **dissipated**. **It is not a dissipation in the Mareva sense** of simply deliberately making away with the assets but any serious risk that the assets may not continue to be available to the company." This was further explained at paragraph 99 of **Rochdale** referred to previously[16].

65. It was further submitted that what the evidence before the trial Judge disclosed was not an intention on the part of the Respondent's shareholders not to repay the debt owed to GORTT, but a difference in policy between them and GORTT over how the debt should be repaid. However based on the evidence this is not entirely accurate. There were real concerns that after 8 years CLF

[14] Re Union Accidental Insurance Co Ltd [1972] 1 All ER 1105, [1972] 1 WLR 640; Re Highfield Commodities Ltd [1984] 3 All ER 884, [1985] 1 WLR 149 (although the court would be slow to appoint a provisional liquidator unless there is a good prima facie evidence that the company would be wound up, **the court's power to make such an appointment is not restricted to circumstances where the company is obviously insolvent,** or it is otherwise clear that the company would be wound up, or the **company's assets are in jeopardy**). See also Securities and Investments Board v Lancashire and Yorkshire Portfolio Management Ltd [1992] BCLC 281, [1992] BCC 381. The risk of dissipation of assets does not necessarily mean deliberate dissipation but any serious risk that the assets may not continue to be available to the company: Re a Company (No 003102 of 1991), ex p Nyckeln Finance Co Ltd [1991] BCLC 539. ….. The usual purpose underlying the appointment of provisional liquidators is to collect and protect the assets of the company pending the making of a winding-up order, though the jurisdiction is not so confined, and **the courts in recent years have been prepared to appoint provisional liquidators more flexibly than in the past**: Re Namco UK Ltd [2003] 2 BCLC 78; and see Smith v UIC Insurance Co Ltd [20001] BCC 11.

[15] Page 658 of the RoA

[16] *I consider that Harman J probably had in mind the type of case in which, despite the presentation of a petition, an apparently insolvent and loss-making company simply continues to trade…*"

was not in a position to repay the remaining debt at all, a concern that was exacerbated by the requisition to change the composition and control of the board.

66. The fact is that CLF had been operating while insolvent since 2009, that the majority shareholders, rather than being voiceless, was entitled to have 3 directors on the Board at all times, and that CLF's continued operation to date was eroding its assets, which in any event were already exceeded by its current liabilities as well as its total and provisional liabilities.

67. Without expressing a view on its impact on the winding-up petition still to be heard, the legal tests to be applied are:

i. **Whether it is likely that the winding-up order will be made**.

The Trial Judge has already answered this in the affirmative, and we see no reason on the evidence, which was common ground between the parties, to disagree with him.

ii. **Whether the circumstances of this case justified the appointment of provisional liquidators to preserve and protect the assets of the company pending the hearing of the winding-up petition**.

In this context it is recognised in law that (a) risk of dissipation is not in the Mareva sense of simply deliberately making away with the assets but any serious risk that the assets may not continue to be available to the company, and (b) that such dissipation could occur when an insolvent company continued to trade,[17]thus justifying the appointment of provisional

[17] **Rochdale** - *I consider that Harman J probably had in mind the type of case in which, despite the presentation of a petition, an apparently* ***insolvent and loss-making company simply continues to trade…***"

liquidators to protect and conserve them. In this case that is precisely the position. This was dissipation, not in the *Oxford Concise Dictionary* sense of "*to waste*", or in the sense used in the context of Mareva injunctions or freezing orders, but rather in the legal sense accepted by him, as making those assets not available for use by the creditors.

iii. It matters not that the proportion of the monthly loss in relation to the total assets appears small as (a). it is an accruing amount, which expressed on an **annual** basis is not at all insubstantial and (b). the comparison with total assets must take into account that those assets are already exceeded by existing liabilities both current and total, separate and apart from the provisional liability of $15 billion claimed by the appellant.

Balance of convenience

68. Counsel for the interested party cited an extract from **Australian Securities and Investments Commission v ActiveSuper Pty Ltd (No. 2) [2013] FCA 234** at paragraph 16 as follows:-

> ***"****In Solomon at 80 Tamberlin J listed six principles concerning the appointment of a provision liquidator, which are often cited in this context:*
>
> *(b****) The fact that the assets of the corporation may be at risk is a relevant consideration.***
>
> *(c) The provisional liquidator's primary duty is to* ***preserve the status quo*** *to ensure the* ***least possible harm to all concerned*** *and to* ***enable the court to decide****, after a further examination,* ***whether the company should be wound up****: Re Carapark Industries Pty Ltd (in liq) (1966) 9 FLR 297; 86 WN (Pt 1)(NSW) 165 at 171.*
>
> *(d) The court should consider the* ***degree of urgency****, the need established by the applicant creditor and* ***the balance of convenience:*** *Re Club Mediterranean Pty Ltd (1975) 11 SASR 481 at 484 per Bright J.* ***The power is a broad one*** *and circumstances will vary greatly.* ***Commercial affairs are infinitely complex*** *and various and it is* ***inappropriate to limit the power by restricting its exercise to fixed categories*** *or classes of circumstances or fact."*

69**.** In considering where the balance of convenience would lie one consideration would be whether adequate alternatives exist to the appointment of provisional liquidators for the preservation of the status quo.

> **In Australian Securities and Investments Commission v ActiveSuper Pty Ltd (No. 2) [2013] FCA 234 at paragraph 13, 14** it was stated **:-**
>
> *It is well established* ***that the appointment of a provisional liquidator pending the determination of a winding up application is a drastic intrusion into the affairs of the company and will not be done if other measures would be adequate to preserve the status quo:*** *Zempilas v J N Taylor Holdings Ltd (No 2) (1990) 3 ACSR 518 at 522; Constantinidis v JGL Trading Pty Ltd (1995) 17 ACSR 625 at 635; Lubavitch Mazal Pty Ltd v Yeshiva Properties No 1 Pty Ltd (2003) 47 ACSR 197 at [105]; Australian Securities and Investments Commission, in the matter of Bennett Street Developments Pty Ltd v Weerappah (No 2) [2009] FCA 249 at [8]; Australian Securities and Investments Commission v Tax Returns Australia Dot Com Pty Ltd [2010] FCA 715 at [86]*.
>
> ***Therefore, an applicant must also show some good reason for intervention prior to the final hearing of the winding up application. For example, an applicant may show that the appointment is needed in the public interest or to preserve the status quo or to protect the company's assets or affairs:*** *Allstate Exploration NL v Batepro Australia Pty Ltd [2004] NSWSC 261 at [30]; Weerappah at [8]*.

70. On the hearing of this appeal alternatives were suggested. However, they are all inadequate to preserve the status quo or protect the appellant. They included the following:-

(a) that an action for specific performance of the shareholders' agreement was one such alternative. However the shareholders' agreement had long lapsed. Further, apart from delay in obtaining a hearing and determination of such an application, (which would clearly have been resisted), its final outcome, even if successful, would have gone no way toward securing and preserving the assets of CLF for its creditors. However the application for the appointment of joint provisional liquidators, if successful, can achieve this.

(b) An action against the Respondent for oppression under **section 242** of the **Companies Act**. However, In terms of **protection** and **conservation** of assets in respect of a claimed **debt** of $15 billion such an action clearly could not be an adequate alternative.

(c) An injunction preventing the Respondent from dissipating its assets and/or those of its subsidiaries above a certain value, without the consent of GORTT. However to be effective that value would have had to encompass the entirety of CLF's assets as even apart from the appellant's claim they are already exceeded by its total liabilities. Furthermore continued operation of CLF on the evidence is resulting in operational losses and eroding its already encumbered asset base. An injunction would therefore be of limited value, as opposed to the appointment of provisional liquidators, who could be appointed with appropriate powers to identify and preserve its assets.

(d) Another alternative suggested was *"as opposed to the drastic order of the appointment of joint provisional liquidators, seeking instead an order (in the winding up proceedings) directing the Respondent's shareholders to make best efforts to conciliate over the dispute between them and GORTT over the differences in policy in respect of how the debt should be repaid"*. However no efforts were made in this regard since June 23rd 2017 to the date of hearing of the appeal, and in the abstract, this suggestion cannot be considered as an adequate or even an effective alternative to the appointment of provisional liquidators.

Balance of convenience

71. The balance of **convenience** does not in that context favour continued trading. Rather it favours the appointment of joint provisional liquidators to protect and conserve the assets at this point, for the protection of all creditors, which include the appellant and taxpayers. It favours the appointment in principle of provisional liquidators pending the hearing and determination of the winding up petition for the identification, protection and conservation of the assets of CLF after 8 years of financial support.

72. In the our view the greater risk of injustice lies with the alternative of permitting the company to operate as though it were business as usual with a monthly loss, increasing operational losses and liabilities, and the real potential for the utilisation of its assets other than for the payment of its debts. This is an unsustainable situation.

73. On the basis of the totality of the evidence before him, as set out partially above, and as explored in the exchanges between us and Counsel at this hearing, we consider that we are justified in reversing it by appointing joint provisional liquidators with immediate effect. We are satisfied that there has clearly been demonstrated that the balance of convenience favours, and the significant public interest in the outcome of this application weighs heavily in favour of, the application to preserve and protect the further dissipation of CLF's assets. We consider that this is in the public's interest, given that it is taxpayers ultimately who are the majority creditors of this company.

74. Accordingly protections can be, (and were), built into the order providing for the provisional liquidators, for example the provisional liquidators must apply to the court before disposal of any assets.

Public interest

75. It was contended that CLF is insolvent and the continued operation of CLF as a going concern is reckless and should not be permitted to continue having regard to the level of its insolvency; (see section 447 (4) of the Companies Act). Its continued operation was contrary to the public interest.

76. When the appellant, on behalf of taxpayers, is claiming to be owed $15 billion after extending financial support in excess of $23 billion it is clearly in the public interest to permit the appellant to take steps for the appointment of provisional liquidators who will report to the court and whose role is constrained and defined by the terms of the order appointing them.

77**.** The majority of the indebtedness is to the Government and taxpayers. They are entitled to have the assets of this company preserved pending a plan for the repayment of the debt. The attempt by the Shareholders to regain control of the Board, contrary to the original Shareholders Agreement and subsequent extensions to August 2016, without the company having repaid that debt weighs in favour rather than against the appointment of provisional liquidators.

78 On that basis, we indicated that we were prepared to accede to the request for the appointment of joint provisional liquidators with immediate effect. We heard the parties on the

terms of the Order that should be made, bearing in mind that we considered that the powers of joint provisional liquidators should not be so extensive as the full panoply of powers available to a liquidator appointed on a final hearing of the winding-up petition.

79.. After discussions and input of the parties before the court, but without prejudice to their position that they were not accepting the necessity for the appointment of joint or any provisional liquidator, an order was produced, initialled by the parties to reflect this approach as far as possible, without rendering unworkable the exercise of the provisional liquidators' powers.

Conclusion

80. The trial judge was plainly wrong:-

a. in misconstruing the evidence, and

b. in not applying the legal test which he had accepted as correct, in relation to dissipation of assets, (a consideration relevant to the appointment of provisional liquidators).

81. More particularly, the trial judge fell into error in:-

i failing to consider the **totality of the evidence** before him of the company's current financial position;

ii. in selecting **one aspect** of that evidence, (the operational loss for 2017) to the exclusion of the **totality** of that evidence;

iii. in misconstruing the effect of the evidence that he did consider;

iii. in failing, (despite referring to it), to apply (in relation to a company continuing to trade after presentation of a winding up petition), the correct meaning of *dissipation* of assets;

iv. in applying instead a test for dissipation based on the Concise Oxford Dictionary (*to waste*), and a further test that a *serious effect* on the assets of the company needed to be demonstrated;

v. in ignoring his own finding as to what the correct legal meaning was;

iv. in any event, in failing to consider and properly apply to the particular current circumstances of the CLF any of the tests that he referred to in relation to dissipation of assets, leading to the erroneous conclusion that it was premature in the circumstances to appoint joint provisional liquidators.

Totality of the evidence

82. 1. the evidence derived from the company's management accounts is that even before the claimed liability to the Government and taxpayers of $15 billion is taken into account, as at April 2017:-

i. its current liabilities exceed its current assets, (by $4,.185 billion – an increase from December 2015)

ii. its total liabilities exceed its total assets, (by $ 3.396 billion – an increase from December 2015)

iii. and its current liabilities exceed its total assets (by $659 million – an increase from December 2015)

2. It is common ground that there has been a long term insolvency of CLF since 2009,

3. The trial judge considered that the company was in that scenario up to April 2017 operating at an average monthly loss of at least $900,000.00 (even assuming that figure to be correctly

interpreted). However he held that in the context of the entire asset base of CLF this was not an excessive amount in the court's view. He failed thereby to take into account the evidence above, as well as other figures in that balance sheet that he referred to, for example the actual loss for the same period after taxation. He failed to appreciate therefore that the losses that he identified, or any losses at all, was in the context of assets which were already **fully exceeded by liabilities**, and would have the effect of continuing to further erode those assets).

4. In those circumstances his evaluation of the evidence was plainly wrong. Further the application to the evidence of:-

a. a requirement to establish that the company was dissipating assets in the sense of **wasting** assets, or,

b. that it had to be demonstrated that day to day operations of CLF would have a **serious effect** on the assets of the company as a precondition to be satisfied before the appointment of provisional liquidators,

were both plainly wrong.

In those circumstances the refusal to appoint joint provisional liquidators is therefore reviewable by an appellate court.

83. Further for the very reasons identified above, namely that on the evidence the continued operation of CLF is prima facie dissipating its assets, in the sense that term is used in law, it is necessary, and in the public interest, that joint provisional liquidators be appointed with immediate effect to protect and conserve the assets available for all CLF's creditors, including the applicant.

Order

84. After consultation with all parties an order was entered (though not by consent) in the following terms.

1. The appeal is allowed and the order of the Honourable Mr. Justice Ramcharan dated 19 July 2017 is set aside;

2. Pursuant to section 370 of the Companies Act, Chap. 81:01 and Rule 24 of the Companies Winding Up Rules Mr. Hugh Dickson and Mr. Marcus Wide of the international accounting firm Grant Thornton are appointed Joint Provisional Liquidators in relation to CL Financial Limited ("**CLF**" or "the **Company**") in order to protect and conserve the assets of CLF and curtail wasteful expenditure and liabilities pending the determination of the winding up petition, and that the powers of the Joint Provisional Liquidators be limited and restricted to the following acts, which may be done by each of them individually:-

    a. power to take into possession, and collect in the assets (of whatever nature) to which CLF is or appears to be entitled, including the books and records of CLF;
    b. power to do all things which may be necessary or expedient for the protection of CLF's assets whether in this or any other jurisdiction;
    c. power to investigate the affairs of CLF;
    d. power to bring, continue or defend any action or other legal proceedings on behalf of CLF in this or any other jurisdiction including (without limitation) power to commence such actions for the protection and/or for

the recovery of documents or assets as may be required and to seek appropriate interlocutory relief;

e. power to employ such professional advisers as may be necessary to assist them in the performance of their duties;

f. power to appoint an agent to do any business which they are unable to do themselves or which can more conveniently be done by an agent;

g. power to retain and operate the existing bank accounts of CLF and to open and operate new accounts and to pay any necessary expenses incurred on behalf of CLF in carrying out their powers and duties from such accounts;

h. power to enter into or terminate any contracts or transactions relating to CLF as may be necessary;

i. power to sell, distribute, part with or otherwise dispose of the assets of CLF **with the approval of the court**;

j. power to make any arrangement or compromise on behalf of CLF with the approval of the court;

k. power to retain, dismiss or otherwise deal with employees **of CLF** as may be necessary;

l. Other than as provided for at paragraph (i), power to deal with real property of CLF of all kinds including leases as may be necessary;

m. power to maintain insurances;

n. (power to) make a proposal under the Bankruptcy and Insolvency Act, Chap. 9.70 on behalf of CLF;

o. power to do all other things reasonably and properly incidental to the

performance of the foregoing functions and powers; and

p. power to apply for further relief or directions from the court.

3. That within twenty-one (21) days from the date hereof, CLF do make out and submit to the Joint Provisional Liquidators a statement as to the affairs of the Company verified by affidavit and showing particulars of the assets, debts and liabilities of the Company, the names residences and occupations of its creditors, the securities held by them respectively, the dates when the securities were respectively given and such further or other information as the Joint Provisional Liquidators may require.

The statement shall be submitted and verified by one or more of the persons who are at the date hereof the directors and by the person who is at that date hereof the secretary of the Company, or by such of the persons hereinafter mentioned as the Joint Provisional Liquidators, subject to the direction of the Court, may require to submit and verify the statement, that is to say, persons—

(a) who are or have been officers, other than employees, of the Company;

(b) who have taken part in the formation of the Company at any time within one year before the relevant date;

(c) who are in the employment of the Company, or have been in the employment of the Company within that year, and are in the opinion of the Joint Provisional Liquidators capable of giving the information required; and

(d) who are or have been within that year officers of or in the employment of a

Company, which is, or within that year was, an officer of the Company to which the statement relates;

4. That the reasonable costs of and expenses incurred by the Joint Provisional Liquidators pursuant to this Order be borne by CLF, subject to the Court's approval.

5. That the Joint Provisional Liquidators do file with the Court considering the winding up petition and serve on all the parties appearing before the Court today accounts of such costs and expenses incurred every three (3) months commencing on the first working day of November 2017 and continuing thereafter until further order.

6. (That) The interested parties do pay the costs of the Appellant to be taxed in default of agreement certified fit for Senior and Junior Counsel.

NOTE: It will be the duty of such of the persons as are liable to make out or to concur in making out a Statement of Affairs as the Joint Provisional Liquidators may require and to attend on the Joint Provisional Liquidators at such time and place as they may appoint and to give them all information they may require.

…….

Peter A. Rajkumar

Justice of Appeal