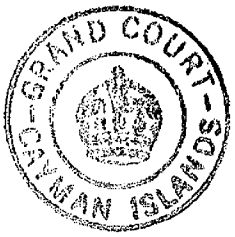
IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

Hon Mr Justice Andrew J. Jones, QC
17th December 2010, 4th and 7th January 2011, in open court



IN THE MATTER OF THE BANKRUPTCY LAW (Cap.7) ((1997 Revision)

AND IN THE MATTERS of

(1) Joe Otu, a debtor	**Cause No. FSD 240 of 2010**
(2) Margaret Mendes, a debtor	**Cause No. FSD 241 of 2010**
(3) Jc sephine Otu, a debtor	**Cause No. FSD 242 of 2010**
(4) Fernando Mendes, a debtor	**Cause No. FSD 243 of 2010**

EX PARTE Jorge and Paul Geissler, judgment creditors

Appearances : Ms Nicola Moore of Priestleys for the Judgment Creditors
Mr Richard Annette of Stuarts for Mr and Mrs Mendes
Mr Kyle Broadhurst of Broadhurst Barristers for Mr and Mrs Otu

REASONS

1. Mr and Mrs Otu and Mr and Mrs Mendes (whom I shall refer to collectively as "the Debtors") are jointly and severally liable for a judgment debt of US$513,638.78 including pre-judgment interest and costs. Post-judgment interest is accruing at the prescribed rate. Bankruptcy petitions were presented against each of them on 9th November 2010. The act of bankruptcy relied upon in each case is that the Debtor failed to pay the judgment debt and that it remained unsatisfied for more than 7 days after service of the bankruptcy notice. On 1st December 2010 I made *ex parte* provisional orders (pursuant to section 29) against each of the Debtors, by which it was ordered that their affairs be wound up and their property administered under the Bankruptcy Law unless they were able to show cause to the contrary at a hearing to take place on 17th December 2010.

2. When the matters came on for hearing on the 17th December, counsel for Mr and Mrs Mendes sought an adjournment on the basis that his clients would be able to satisfy the judgment in full within a matter of a few days for reasons set out in an affidavit sworn by Mr Fernando Mendes. In summary, the affidavit states that Mr and Mrs Mendes own 50% of the issued share capital of a property holding company called Centurion Development Corporation Limited ("Centurion") and that they have agreed to sell their shareholding for US$600,000. It was said that the purchase price would be credited to Stuarts' trust account within a few days, whereupon it would be possible to take the steps necessary to discharge the provisional order and pay the Judgment Creditor in full. The purchaser is said to be Mr. Antonio Sousa, a Portuguese businessman involved in the construction industry in various parts of the world. Mr Mendes' evidence is that he has known Mr Antonio Sousa in a professional capacity for about three years and, through his counsel, Mr Mendes assured the Court that he would be in a position to close this transaction within a matter of days. Mr and Mrs Otu are not involved in this transaction but they have an obvious interest in it because, if Mr and Mrs Mendes satisfy the judgment debt in full, the provisional orders against Mr and Mrs Otu will also be discharged. The fact that Mr and Mrs Mendes will be entitled to seek a contribution from their co-debtors is of no relevance to the Judgment Creditors and has no bearing on the outcome of these proceedings.

3. It has to be said that the evidence put before the Court at the first hearing was not entirely satisfactory. There is no direct evidence from Mr Antonio Sousa. It would have been possible for the parties to execute a share purchase agreement which was expressed to be subject to a condition subsequent to the effect that the provisional orders for bankruptcy against Mr and Mrs Mendes are discharged. No such agreement has been executed, although I was shown some draft contract documentation prepared by Stuarts. The most favourable conclusion to draw from this evidence is that Mr and Mrs Mendes own an asset worth US$600,000 and that there is a prospect of being able to sell it in the near future. On this basis I adjourned all four cases, initially until Wednesday 22nd December. Mr Annette said that he was expecting funds to be credited to his firm's trust account by close of business on Tuesday 21st, but I indicated that I would adjourn the matters until Tuesday 4th January 2011 if the funds had not been received by the anticipated time. In the event the funds were not received and I adjourned the matter until 4th January without having any hearing on the 22nd December.

4. During the two weeks following the first hearing, no positive steps were taken towards concluding the proposed sale of the Centurion shares. No new evidence was filed. By the time of the adjourned hearing on 4th January, there was still no affidavit sworn by Mr Sousa confirming his intention to buy the shares. Nor was there any other affidavit

evidence explaining why no further steps had been taken towards executing a share purchase agreement. Most importantly, the purchase price of US$600,000 had still not been credited to Stuarts' trust account. Nevertheless, Mr Annette felt able to express "confidence" that the money would be received almost immediately in spite of having no evidence to support the instructions received from his clients. Somewhat reluctantly, I granted one final adjournment until Friday 7th January.

5. When the matter came on for hearing today, I was told that the purchase money has still not been credited to Stuarts' trust account. I was handed a copy of an e-mail transmitted earlier in the day from Mr Antonio Sousa to Mr Fernando Mendes. It states as follows –

"Following m[y] email of December 17th 2010, [which is recited in paragraph 6 of Mr Fernando Mendes' affidavit sworn on 17th December] *I wish to make the following changes.*

- *A gentleman's agreement has been reached between I and Mr Fernando Mendes and a transfer of US$410,000 [h]as been requested in favor of Mr Fernado Mendes attorneys and it is not conditional to an agreement to be reached in respect of the transfer of shares.*
- *The US$408,860.81 is for immediate payment to Pristley's Attorneys at Law on behalf of their clients, Jorg and Paul Geissler.*
- *The remaining amount and further transfers to be made are to be held by Mr Fernando Mendes for the negotiation and/or purchase of 50% of the shares owned by Lets Go Building & Maintenance.*

He goes on to explain why the funds transfer has not taken place. He refers to travelling problems as a result of bad weather in Europe and having insufficient funds in his bank account at the time. He says that he now has the necessary funds but his "*bankers showed some difficulties in processing my request due to their strict policies of having signed original instructions.*" He concludes by saying that he is very much interested in doing business with Mr Fernando Mendes in the Cayman Islands and asks the Court to take this fact into account and to adjourn the hearing again until 20th January 2011.

6. On the basis of this evidence, I draw the following conclusions. First, Mr and Mrs Mendes do not have the benefit of a contract to sell the Centurion shares which would become enforceable in the event that I discharge the provisional orders made against them. Second, the assurances given to the Court by counsel at the two previous hearings were, at best, over optimistic. Third, Mr Antonio Sousa appears to be willing to advance money to Mr and Mrs Mendes on the basis of some form of "gentleman's agreement" involving the possible purchase of the Centurion shares, but the specifics have not been agreed and recorded in writing. In my judgment, these findings do not justify granting any further adjournments.

7. Having refused to grant an adjournment, I then heard submissions from Mr Broadhurst, counsel for Mr and Mrs Otu, about the form of order which should properly be made in these circumstances. Having referred me to sections 31-33 and sections 41-47 of the Bankruptcy Law, I concluded that I should make an order based upon Form 12 of the Bankruptcy Rules. Section 33 requires various steps to be taken before the Court reaches the stage of deciding whether or not the provisional orders should be made absolute. First, each of the Debtors is required to prepare a statement of affairs within a specified number of days. Counsel for the Debtors agreed that 21 days would be a reasonable time within which to prepare and verify these statements. Second, section 41 requires (at least so long as the provisional orders are not made absolute) that I convene meetings of creditors. These meetings should take place after the Debtors have filed their statements of affairs and section 41 requires that the Trustee in Bankruptcy shall attend the meetings. In practice, she (or her agent) must chair the meetings. Third, a necessary consequence of making orders pursuant to sections 31 and 41 is that I must consider authorizing the Trustee in Bankruptcy to appoint an agent pursuant to the powers contained in section 13 of the Bankruptcy Law.

8. In exercise of the power conferred on the Governor-in-Council by section 12 of the Bankruptcy Law, the Clerk of the Court was appointed, *ex officio*, as trustee in bankruptcy. Notice of the appointment was published in Gazette No.9 on 5th May 1980. However, those appointed to the office of Clerk of the Court are not required to be qualified insolvency practitioners and the Court Office does not have the human resources necessary to perform the functions of a trustee in bankruptcy. For these reasons, it is both necessary and appropriate that the Clerk of the Court should exercise the power conferred upon her by section 13 to appoint a proper person to act as her agent in respect of the Debtors' estates. For the purposes of determining who can properly act as the trustee's agent, the Court has regard to the provisions of the Insolvency Practitioners' Regulations 2008 (as amended) ("the Regulations"). Strictly speaking, the Regulations only apply to the appointment of persons to act as official liquidators of companies, but the provisions relating to professional qualifications and the requirements relating to residency, independence and insurance are equally applicable to the appointment of a trustee's agent.

9. The Judgment Creditors nominated Mr Michael Saville, a director of Begbies Traynor Cayman Limited, for appointment as trustee's agent in respect of each of these four estates. He swore affidavits on 9th November 20010 in the usual form required by CWR Order 3, rule 4(1). No objection to his appointment has been made on behalf of the Debtors and I am satisfied that he is a fit and proper person to be appointed in respect of these estates. A draft agency agreement was prepared by the Judgment Creditors' counsel and circulated in advance of the hearing to all concerned. I was told that the terms of this

draft are acceptable to the Clerk of the Court and Mr Saville and no objection has been expressed on behalf of the Debtors. I am satisfied that its terms are appropriate and the Clerk of the Court, acting in her capacity as *ex officio* Trustee in Bankruptcy, is authorized to execute the agreements in terms of the draft in respect of each of the four estates, by which Mr Michael Saville will be appointed as agent. I shall refer to him as "the Trustee's Agent".

10. It is not necessary for me to comment on the terms of the draft agency agreement except for Clause 8 which provides that the Trustee's Agent shall be entitled to be remunerated out of the assets of the Debtors'estates in accordance with the specified scale of hourly rates. In determining the reasonableness of this scale I had regard to the minimum and maximum rates prescribed by the Schedule to the Regulations. Whilst these Regulations are not applicable to the appointment of a trustee's agent, the criteria underlying them are no less applicable to a personal bankruptcy than the liquidation of a company. In determining how to apply the statutory scale, the concept of "proportionality" comes into play. The bankruptcy of individuals who have conducted simple business activities on a modest financial scale should not give rise to any particularly complex issues. The level of responsibility imposed upon a qualified insolvency practitioner must have some correlation to the size of the estate in question. The skill set and level of experience required of the staff who will work on a modest personal bankruptcy is not the same as that required of those who will work on complex mutual fund liquidations. It follows that the level of fees properly payable in respect of personal bankruptcies must always be close to, or even below, the minimum rates prescribed by the Regulations. It also follows that a greater proportion of the work can be delegated down to the more junior grades of staff. Under the terms of the agency agreements which I have approved, work done by Mr Saville personally will be charged at US$400 per hour, which is less than the minimum rate prescribed by the Regulations. I anticipate that he will perform a high level supervisory role and that the bulk of the work will be done by a manager and/or senior at US$300 or $270 per hour respectively. These rates are close to the prescribed minimum.

11. Having ordered the Debtors to prepare and file statements of affairs, I went on to give some consideration to the manner in which this exercise will be performed. It is in the interests of both the Debtors and their creditors that the statements of affairs are accurate, complete and presented in a way which is readily understandable by the creditors. Any failure, for whatever reason, to achieve this objective is likely to give rise to suspicion on the part of creditors and result in stress and loss of credibility on the part of the Debtors. It is a part of the job of the Trustee's Agent to provide both direction and assistance to the Debtors in connection with the preparation of their statements of affairs. To this end, I directed that the Debtors shall attend before the Trustee's Agent whenever he requires them to do so on not less than 24 hours prior notice.

12. Finally, I was asked by Counsel for the Judgment Creditors to make a direction to the effect that the Trustee's Agent be authorized to engage attorneys at the expense of the estates. I declined to do so because I think that the application is premature. If and when the Trustee's Agent considers that he needs professional legal assistance, he can make an application. The work involved in identifying and securing the Debtors' assets, securing preparation of the statements of affairs and conducting the creditors' meetings should not give rise to any need for legal advice.

Order accordingly.

Dated 7th January 2011

The Hon Mr Justice Andrew J. Jones QC