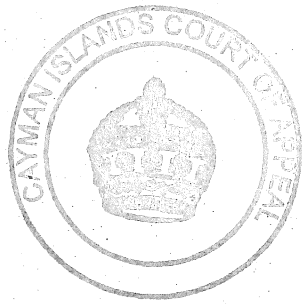
IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS
CIVIL APPEALS NO. 01, 02, 03, 04/2003

IN THE MATTER OF THE COMPANIES LAW (2002 REVISION)
AND
IN THE MATTER OF WATERFORD INSURANCE LTD.

IN THE MATTER OF THE COMPANIES LAW
AND
IN THE MATTER OF LIBERTY CAPITAL LIMITED



IN THE MATTER OF THE COMPANIES LAW
AND
IN THE MATTER OF INTEGRITY LIMITED

IN THE MATTER OF THE COMPANIES LAW
AND
IN THE MATTER OF SUN HOLDING LIMITED

("APPELLANTS")

BEFORE: **The Rt. Honourable Mr. Justice E. Zacca, President.**
The Honourable Mr. Justice G. Collett, J. A.
The Honourable Mr. Justice I. D. Rowe, J. A.

APPEARANCES: Mr. G. Moss Q.C., and Mr. G. Locke of Walkers, Mr. Andrew Jones Q.C. of Maples and Calder, Miss Sarah Dobbyn of Hunter & Hunter for the liquidators.

Heard: April 29, 2003 **Delivered: 1st August, 2003**

ZACCA P.

These are appeals against a ruling of the Grand Court sitting *en banc*. The ruling was as a result of petitions before the Court for winding up Orders and for Orders approving the liquidators' fees.

In causes 579, 580 and 581/2002 which are now appeals 2, 3, 4/2003, the joint official liquidators sought Orders for remuneration at the following hourly rates:

Partner	U.S.$	450.00
Director		385.00
Assistant Director (Senior Manager)		330.00
Senior Executive (Manager)		280.00
Executives (Senior Accountant)		185.00
Administrative Assistant		95.00

In the fourth matter cause 522/2002, now appeal 1/2003, the joint official liquidators sought Orders in the following terms:-

> "The joint official liquidators and their staff be remunerated out of the assets of the company at their usual customary rates, such fees and expenses to be approved by the Court."

The Court gave reasons for judgment in all four matters. No formal Order was drawn up to reflect what were the precise Orders made by the Court. However, the liquidators in each case, have filed identical notices of appeal in which they have identified nine specific Orders from the *en banc* judgment.

These are –

(1) Official liquidators and their staff may only charge fees at prescribed rates according to guidelines laid down by the Court and more fully set out at page 17 of the judgment.

(2) No separate fees should be allowed for official liquidators' non-professional support staff save where there is for a significant and identifiable task more complex or onerous than usual.

(3) Such non-professional support staff may charge fees, if applicable, at a rate of $50.00 per hour.

(4) Costs associated with applications for obtaining approval of fees will not be

approved by the Court for payment out of the liquidation estate.

(5) Time records of official liquidators and their staff must be recorded at minimum intervals of 0.10 per hour.

(6) When considering the reasonableness of fees charged by official liquidators and their staff, the relevant creditors' committee, if constituted, should do so on the basis of the prescribed guidelines laid down by the Court and more fully set out at pages 27 to 29 of the judgment.

(7) Pre-approved international fee protocols accepted by a foreign court and presented for approval by the Grand Court must show evidence of the foreign court's informed consideration of the issues raised in the judgment.

(8) Current time rates generally adopted by insolvency practitioners for similar types of

> work are not accepted as a criterion for setting appropriate rates of remuneration for liquidators and their staff.
>
> (9) Fees charged by liquidators and their staff are to be submitted to court for approval.

Counsel for the appellants has submitted that the Grand Court sitting *en banc* erred by not following the English Insolvency Rules 1986 as the primary method for fixing the remuneration of the liquidators in a winding up in the Cayman Islands. It was also submitted that the method by which the Court fixed the fees was inappropriate and not in accordance with the Insolvency Rules 1986 and the principles established from previous cases. It was also argued that the appropriate procedure was to allow the creditors' committee to approve the fees and that the Court should not readily interfere with their decision.

The English Insolvency Rules are applicable to the Cayman Islands by virtue of Grand Court Rules Order 102 Rule 17, which were introduced in the Cayman Islands in 1995.

Winding up rules O. 102, r 17 –

> 17. Unless and until any rules are made under section 174 of the Law, all applications to

> the Court made pursuant to sections 49, 79 and Part V of the Law and all proceedings concerning or arising out of the liquidation of any company shall, so far as practicable, be made in accordance with the Insolvency Rules 1986 (SI 1986/925) in so far as such rules are not inconsistent with the Law or such other rules as may be applied to the proceeding in question.

The English Insolvency Rules 1986 were applied by Smellie J. (as he then was) in the matter of *re Johnson* 1996 CILR Note 3: -

> "An application by the liquidators of a company for increased fees should be made in accordance with the Insolvency Rules, rr 4. 129 and 4. 130 (as applied to the Cayman Islands by the Grand Court Rules, 1995, o. 102, r 17) and may not be made *ex parte*. The fees of liquidators are set, in the first instance under r 4. 127 by a liquidation committee or if there is none, by a meeting of the company's creditors. <u>If they are considered to be insufficient the liquidators may then apply to the creditors, and/or to the Court with notice to the liquidation committee or creditors as appropriate for an increase.</u> The Court may then have regard to purely economic factors, such as the increased costs of practising in the Cayman Islands, "consumer price" indices and the fees of other Cayman practitioners in determining a reasonable

> fee (In re Phillips (Joseph) Ltd. [1964] 1 W.L.R. 369, applied)".

With great respect to the Grand Court in the *en banc* ruling it appears that Smellie J got it right in 1996.

The English Insolvency Rules 1986 were also applied by the Court and the Privy Council in the matter of ***Cleaver and Bodden v Delta American Reinsurance Company*** [2001] CIL R34.

The *en banc* Court also stated that the Grand Court Rules have expressly adopted the Insolvency Rules 1986.

It is necessary now to look at provisions of the Companies Law (2002 Revision) and the Insolvency Rules 1986. Section 107 (2) of the Companies Law states:-

> "There shall be paid to the official liquidator such salary or remuneration, by way of percentage or otherwise, as the Court may direct, and if more liquidators than one are appointed such remuneration shall be distributed amongst them in such proportions as the Court directs".

<u>The Insolvency Rules 1986</u>

4.127: Fixing of Remuneration

4.127(1): (entitlement to remuneration)
the liquidator is entitled to receive remuneration for his services as such.

4.127(2): The remuneration shall be fixed either –

(a) as a percentage of the value of the assets which are realized or distributed, or of the one value and the other in combination, or

(b) by reference to the time properly given by the insolvency practitioners (as liquidator) and his staff in attending to matters arising in the winding up.

4.127(3): where the liquidator is other than the official receiver, it is for the liquidation committee (if there is one) to determine whether the remuneration is to be fixed under paragraph (2) (a) or (b) and if under paragraph 2(a) to determine any percentage to be applied as there mentioned.

4.127(4): In arriving at that determination, the committee, shall have regard to the following matters:-

(a) The complexity (or otherwise) of the case.

(b) Any respects in which, in connection with the winding up, there falls on the insolvency practitioner (as liquidator) any responsibility of an exceptional kind or degree.

(c) The effectiveness with which the insolvency practitioner appears to be carrying out, or to have carried out, his duties as liquidator, and

(d) The value and nature of the assets with which the liquidator has to deal.

4.127(5): If there is no liquidation committee or the committee does not make the requisite determination, the liquidator's remuneration may be fixed (in accordance

with paragraph (2)) by a resolution of a meeting of creditors, and paragraph (4) applies to them as it does to the liquidation committee.

4.128(2): Where there are joint liquidators, it is for them to agree between themselves as to how the remuneration payable should be apportioned. Any dispute arising between them may be referred –

(a) to the Court, for settlement by Order, or

(b) to the liquidation committee or a meeting of creditors, for settlement by resolution.

4.129: If the liquidators' remuneration has been fixed by the liquidation committee, and he considers the rate or amount to be insufficient, he may request that it be increased by resolution of the creditors.

4.130(1): If the liquidator considers that the remuneration fixed for him by the liquidation committee, or by resolution of the creditors, or as under Rule 4.127(6), is insufficient, he may apply to the Court for an Order increasing its amount or rate:

4.130(2): The liquidator shall give at least 14 days notice of his application to the members of the liquidation committee, and the committee may nominate one or more members to appear or be represented and to be heard on the application.

4.130(3): If there is no liquidation committee, the liquidator's notice of his application shall be sent to such one or more of the company's creditors as the Court may direct,

which creditors may nominate one or more of their number to appear or be represented.

4.130(4): The Court may, if it appears to be a proper case, Order the costs of the liquidator's application, including the costs of any member of the liquidation committee appearing or being represented on it, or any creditor so appearing or being represented, to be paid out of the assets.

4.131(1): Any creditor of the company may, with the concurrence of at least 25 percent in value of the creditors (including himself), apply to the court for an Order that the liquidator's remuneration be reduced, on the grounds that it is, in all the circumstances, excessive.

4.131(2): The court may, if it thinks that no sufficient cause is shown for a reduction, dismiss the application, but it shall not do so unless the applicant has had an opportunity to attend the Court for an *ex parte* hearing of which he has been given at least 7 days notice.

4.131(4): If the Court considers the application to be well founded, it shall make an Order fixing the remuneration at a reduced amount or rate.

4.131(5): Unless the Court Orders otherwise, the cost of the application shall be paid by the applicant, and are not payable out of the assets.

The Insolvency Rules 1986 provide for the fixing of fees for provisional liquidators to be fixed by the Court.

Rules 4.30(1): The remuneration of the of the provisional liquidator (other than the official receiver) shall be fixed by the court from time to time on his application.

4.30(2): In fixing his remuneration, the Court shall take into account –

(a) the time properly given by him (as provisional liquidator) and his staff in attending to the company's affairs;

(b) the complexity (or otherwise) of the case;

(c) any respects in which, in connection with the company's affairs, there falls on the provisional liquidator any responsibility of an exceptional kind or degree;

(d) the effectiveness with which the provisional liquidator appears to be carrying out, or to have carried out, his duties; and

(e) the value and nature of the property with which he has to deal.

It appears from an analysis of the Insolvency Rules that in the first instance it is for the liquidation committee, if there is one, to fix the remuneration of the liquidator's fees. If there is no liquidation committee then the fees may be fixed by a resolution of the creditors. There is provision in the rules for the liquidator to apply to the Court if it is considered that the fees are insufficient. He may apply to the Court for an Order increasing the amount or rate. The creditors may also apply to the Court for an Order that the liquidator's remuneration be reduced.

Where the application is made by the liquidator the Court may Order that the costs of the application be paid out of the assets, if the Court considers it to be a proper case.

Where the application is made by the creditors, the cost of the application is to be paid by the applicant unless the Court Orders otherwise.

Whilst in the case of the liquidator the rules provide for the remuneration of the liquidators to be fixed by the liquidation committee or by the resolution of the creditors, it is the Court that is required to fix the remuneration of provisional liquidators. If the rules had required the remuneration of the liquidators to be fixed by the Court in the first instance, then the rules would have so stated.

If the liquidator wishes he may apply to the Court to have his remuneration approved. He could do so by reason of the provision of s.107(2) of the Companies Law.

If the Court is requested to fix the remuneration, what procedure should the Court take in fixing the remuneration? The *en banc* ruling has laid down guidelines, fixing various rates per hour depending on the length of one's experience. In fixing these rates the Grand Court at page 14 of the judgment after setting out their reasons stated: -

> "For the above reasons, this court is not persuaded that appropriate market forces are at work in

> setting rates here. Nor is the Court satisfied that the creditors' committees have the knowledge or information to gauge whether fees are fair and reasonable. Indeed some may feel they are not in a position to challenge what a large accounting firm or large law firm tells them are the "going rates". The Court acknowledges in principle that, if rates are set by competitive forces in a functioning market and the creditors' committee is sophisticated, knowledgeable and properly informed, we would be more willing to ratify fees approved by a creditors' committee".

These conclusions seem to have been arrived at without any evidence being before the Court as to whether a creditors' committee in any given circumstance is sophisticated or knowledgeable or properly informed.

It is not correct to state that they are not in a position to challenge the fees charged by the liquidators. As we have already said, the Insolvency rules provide that creditors may apply to the Court for liquidators' fees to be reduced.

In attempting to assess what are reasonable rates, the Grand Court was of the view that the Court should be informed of the costs in respect to the services provided. It also wished to know what salaries are paid to accountants.

The Court in its judgment at page 16 stated: -

> "The Court must, therefore, attempt to assess reasonable rates based upon its knowledge of professional fees and of the costs of doing business generally. The Court has a general sense what other professionals (such as architects, physicians, engineers and lawyers) charge. The Court is generally aware of the costs of doing business in the Cayman Islands. We recognize that the costs of living and of doing business here are high but also recognize that this is a tax-free jurisdiction. The Court's experience in approving liquidators' fees over the past several years informs us that the fees charged are in the many millions of dollars. The Court is also generally aware of the incomes earned by professionals here. Moreover if we accept the comparison (which for reasons explained we do not) the cost of living and doing business here while high, is no higher than in other comparable jurisdictions such as Hong Kong, New York or London. We believe that it is, in reality significantly higher in those places."

This is not the case of general public knowledge which could have entitled the Court to take judicial knowledge. The scheme for fixing liquidators' fees which has been adopted within this jurisdiction begins with a consideration by the stakeholders i.e. the liquidation committee or the creditors' committee and ends with the Court as a review body on application by either the liquidators or the creditors. In our view it is quite unnecessary for the Court to assume to know what all professionals earn and what is the cost to them of services which they provide. Unless there is

evidence to the contrary, the assumption should be that the liquidators operate in a free market.

This is not to say that liquidators can charge whatever they wish. As observed above, if the creditors' committee or the creditors themselves are of the view that the fees charged are exorbitant, they can apply to the Court to have the fees reduced.

It is for this very reason why Ferris J., a highly experienced Chancery and insolvency judge sought the assistance of an experienced insolvency lawyer to assist him in fixing the fees for provisional liquidators.

In *the Matter of Independent Insurance Company Limited (in provisional liquidator)* and in *the Matter of the Insolvency Act 1986*, [2003] EWHC 51 (ch.) the Court was asked to fix the remuneration of provisional liquidators as provided for in the Insolvency Rules 1986. Ferris J appointed an assessor, a Mr. Horrocks, a solicitor and a licenced insolvency practitioner to assist him in fixing the fees of the provisional liquidators. In his judgment at paragraph 22, he states: -

> "In the end I think that the anticipated or achieved utilization rate is only one factor in assessing remuneration taking into account all the factors mentioned in IR 4.30. It is inevitable, in my view, that time spent is a major factor and that, in rewarding time spent, <u>the charging rate in the relevant market place is crucial.</u> The Court must I think ask itself whether the charging rates claimed

> are reasonable having regard to the size and difficulty of the task undertaken. This is a case in which the work of the J.P.Ls appears to have been very effective and the amounts involved are very large. Mr. Horrocks, with his considerable experience, has advised me that "I regard the hourly rates charged by the provisional liquidators as being reasonable in the context of the market rates applied by similar firms for assignments of this complexity and size".

The Grand Court did not share the applicant's views on the impact of market forces in the determination of the rates. The Court went on to assess what it termed reasonable rates based on its own knowledge. Whilst it is accepted that the rates ought to be reasonable, this can only be achieved by evidence.

In *the Matter of the Companies Law* (2001 Second Revision) and in *the Matter of Tait International Limited (In liquidation)*, cause No. 217/2001, a matter heard in the Grand Court, Kellock J. was asked to approve fees and expenses of provisional liquidators. In his judgment at pages 11-12, Kellock J stated :-

> "I would have no difficulty approving Provisional Liquidators' fees or official liquidators' fees if such were shown to be charged out at market rates providing I was satisfied that the rates charged were indeed 'market rates'."

There are also a number of other cases where the fees fixed by the liquidators were approved by the Grant Court. Costs of the applications were also Ordered to be paid out of the assets.

In the case of *Mirror Group Newspaper plc v Maxwell and others* [1998] 1 BC LC 638 , where the Court was considering the remuneration of receivers, Ferris J at page 648 stated :-

> "The charging rate claimed must also be proved by evidence, and what is relevant is not the charging rate of the particular individual but the broad average on general rates charged by persons of the relevant status and qualifications who carry out this kind of work".

Again at page 654

> "Looking at the matter from a different angle, I must say that, as a judge, I feel singularly ill-equipped, whether by training or experience, to carry out the task which is involved in the appraisal of the receivers' claim for remuneration. I do not suppose that I am alone among my brethren in this view. In *re Potter's Oils Ltd.* (No. 2) [1986] B C LC 98 at 104, [1986 1 W.L.R. 201 at 207 Hoffmann J said, in relation to the remuneration of a receiver appointed by a debenture holder:
>
> > "The Court is ill-equipped to conduct a detailed investigation of receivers' charges on an itemized basis. A judge could not do so without being expressively educated by expert evidence".

In *re English, Scottish, and Australian Chartered Bank* [1893] 3 Ch. 385, the Court was asked to sanction a scheme which the creditors of the bank had approved. Lindley L. J. at page 409 stated: -

> "If the creditors are acting on sufficient information and with time to consider what they are about, and are acting honestly, they are, I apprehend, much better judges of what is to their commercial advantage than the Court can be. I do not say it is conclusive, because there might be some blot in a scheme which had passed that had been unobserved and which was pointed out later".

In *re Potters Oils Ltd.* [1986] 1 W.L.R. 201, an application was made by a liquidator to disallow or reduce the remuneration of a receiver who had been appointed by a debenture holder and approved his fees. At page 207, Hoffmann J. said: -

> "I respectfully adopt this description, which suggests to me that interference should be confined to cases in which the remuneration can clearly be seen as excessive rather than take the form of a routine taxation by the Court of receivers' remuneration.
>
> Secondly the Court is ill-equipped to conduct a detailed investigation of receivers' charges on an itemized basis. A judge could not do so without being expressively educated by expert evidence".

It may be useful to refer to some sections of the report of Mr. Justice Ferris' working party on the remuneration of office holders: -

4.2. "In all cases it is in the interest of those ultimately entitled to the assets, whether as creditors or beneficiaries or owners in some other capacity, as well as being in the public interest in general, that the office – holder shall carry out his duties with proper skill and care. These duties include the carrying out of certain investigations and the recognition of the public interest element as well as the administration of the assets. These factors in turn require that persons having proper qualifications, experience, skill and integrity shall be available to perform the duties of office holders. In the long term this will only be so if such persons can expect to receive reasonable remuneration for their services as office holders. The lowest rate of remuneration will not necessarily be the most advantageous.

7.1. Our review of the present rules and provisions shows that the persons or bodies who have power to fix the remuneration of an office holder fall into two categories. In the first category fall liquidation committees, creditors, committees, general bodies of creditors or, in some cases, the person appointing the office holder in question. The second category consists of "the Court".

7.2. We see no need to alter the cases in which persons or bodies in the first category have power to fix remuneration. Nor do we see a need to change the identities or composition of those persons or bodies.

7.3. Our primary concern is with cases where

the remuneration is to be fixed "by the Court".

7.4. High Court Judges do not, it seems to us, represent a particularly satisfactory tribunal for this purpose, except perhaps on an appeal on a question of principle rather than quantum, or where points of principle need to be settled in advance of the determination of quantum. The reason why this is so was expressed by Hoffmann J. as follows in *Re Potter's Oils Ltd* [1986] 1 W.L.R. 201 at page 207, when he said, in relation to the remuneration of a receiver appointed by a debenture holder:

> "The Court is ill-equipped to conduct a detailed investigation of receivers charges on an itemized basis. A judge could not do so without being expressively educated by expert evidence."

7.5. The situation may, we suppose, be improved by training, but the question would remain whether High Court Judges ought to be used to do this kind of work, <u>particularly when they have an appellate function to perform in insolvency matters</u>".

Mr. Justice Ferris, it appears, is referring to where there is a dispute and under the Insolvency Rules 1986, the liquidators or the creditors may apply to the Court where there is such dispute. This would indicate that the Court in insolvency cases acts as an appellate court rather than a court to fix the remuneration of liquidators in the first instance.

In considering whether it should be left to creditors' committees to approve the fees of liquidators the Grand Court at page 13 of the judgment said: -

> "The applicants argued that the task of determining reasonable fees should be left to the creditors' committee. We understand this to mean – without any primary involvement or guidance of the Court. This may be acceptable in other jurisdictions but there are significant reasons why it is not wise to do so in the Cayman Islands".

The Grand Court is accepting that under the Insolvency Rules 1986 creditors' committees in other jurisdictions can approve reasonable fees without the involvement of the Court. It then set out reasons why this is not acceptable in the Cayman Islands. Once again the Court makes assumptions without having the evidence to make these findings. In our view the Cayman Islands have experienced and world recognized accountants and we see no reasons why creditors' committees would be less capable of approving fees for liquidators in the Cayman Islands.

In its conclusion the Grand Court held: -

> "In the four applications before us, the liquidators are appointed at the rates set out in these reasons. The reasonableness of the fees charged is to be considered by the respective creditors' committees under the above guidelines. <u>The fees are to be submitted to this Court for approval"</u>

It seems that the Grand Court is stating that in every case, even if the fees are approved by the creditors' committee, the liquidators should return to the Court for its approval.

The Grand Court also held that no separate fees should be allowed for non-professionals but does concede that on occasions fees may be charged for work done by non-professionals. The Insolvency Rules - #4.127(2) (b) provide for remuneration of liquidators and his staff. It is therefore appropriate for separate fees to be allowed for work done by staff in the winding up.

The Grand Court was also of the view that in future, no costs would be awarded where liquidators make applications to the Court for the approval of fees. In its judgment the Grand Court state at page 21: -

> "The Court will not in future approve the costs associated with applications such as these for obtaining approval for liquidators' or lawyers' fees. If the liquidators wish to come to court to seek approval of fees, the costs of preparing the material and appearing in court must be borne by them. Creditors should not have to pay the costs of the liquidator obtaining court approval of his fees, given that approval is sought in the liquidator's own interest."

It would seem that the Court is here saying that it is not necessary for the liquidators to come to court to have fees approved – "If the liquidators wish to come to court to seek approval of their fees".

The work being done by the liquidators is being done on behalf of the creditors. The creditors have an interest to make sure that work done by liquidators is done efficiently by recognized, experienced and capable liquidators.

We see no reason, why, in an appropriate case the costs of the application should not be paid out of the assets. This is particularly so where the Court has itself directed the liquidators to seek prior Court approval of its fees.

There is of course provision in the Insolvency Rules – 4.130(1) and (4) for costs of applications by liquidators to the Court, where there is a dispute as to the fees, to be paid out of the assets.

We accept that fees to be charged by liquidators should be reasonable fees. The question is "what should the Court take into consideration in coming to a conclusion as to what is a reasonable fee?" There must be evidence in Order for the Court to arrive at what is a reasonable fee.

In our view where the Court is required to approve or fix the fees of liquidators, the Court should take into account the market rates as charged in the Cayman Islands. This must also be proved by evidence. In our view it is inappropriate for the Court to lay down guidelines for fee rates.

In summary we hold:

(1) The English Insolvency Rules 1986 particularly Rules 4.127, 4.128, 4.129, 4.130 and 4.131 are the applicable rules in the Cayman Islands for fixing the remuneration of liquidators.

(2) In the absence of any challenge to the process set by the Insolvency Rules by the official liquidator or stakeholders under those rules, no recourse to the Court is required.

(3) There is, therefore, no requirement for the liquidator to make applications to the Court for approval of fees where the fees are approved by a liquidation committee or by a resolution of the creditors. They may however, if they wish, make such an application to the Court. (Section 107(2) The Companies Law).

(4) The matters to be considered by the committee are set out in Rule 4.127(4) of the Insolvency Rules 1986. Where there is no liquidation committee and the fees are approved by a resolution of a meeting of creditors, Rule 4.127(4) also applies.

(5) Where the committee has approved the fees but, nevertheless, the liquidator seeks the approval of the Court, an affidavit from the committee to the effect that the committee has approved the fees, should be filed with the application.

(6) Applications to the Court may be made by either the liquidator or the creditors if a dispute arises as to the amount of the fees to be paid to the liquidators.

(7) Where the Court is required to fix the fees, the market rates as charged in the Cayman Islands should be taken into account. The Court should be provided with expert evidence and should only fix the fees based on evidence before the Court.

(8) The remuneration of provisional liquidators shall be fixed by the Court on the application of the liquidator.

(9) Where applications are made by the liquidator to the Court for the approval of fees, costs may be awarded to the liquidator out of the assets.

It is for these reasons that this court allowed the appeals and set aside in its entirety the judgment of the Grand Court sitting *en banc*.

No Order as to costs was made at the request of counsel.

Zacca, P.

Rowe, J.A.

Collett, J.A.