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## WEBSITE UPDATE

### **BERMUDA (MESSRS. WALSH AND TAAL PROPRIETARY CLAIM)**

In November 2005, the Liquidator caused the Bank to commence ancillary winding-up proceedings in Bermuda designed to increase the efficiency, cost and logistical ease with which litigation and asset recovery in that jurisdiction could be carried forward. The Supreme Court of Bermuda, by Order dated November 10, 2005 (a copy of which can be accessed below at **Appendix 1**) appointed Marcus Wide and PricewaterhouseCoopers (Bermuda) partner Peter C.B. Mitchell, as Joint Provisional Liquidators (“JPLs”) of the Bank in Bermuda.

The application referred to in the Status of File Report posted on this site on April 6, 2006 (to settle the terms of the order of the interlocutory decision of the Court of February 2005) was brought on April 26 and 27, 2006. In addition, further applications made by the JPLs and by Messrs. Walsh and Taal were heard at the same time.

The JPLs application by summons (a copy of which can be accessed below at **Appendix 2**) sought various terms of relief, including:

- Payment out to the JPLs of funds held in Bermuda Commercial Bank (“BCB”) in excess of the lowest intermediate balance as found earlier by Kawaley J.;
- An anti-suit injunction to prevent Messrs. Walsh and Taal from joining the Liquidator or JPLs in their litigation in Toronto, Ontario, Canada; and,
- Case management directions in relation to the prosecution of Messrs. Walsh and Taal’s proprietary claim to the monies held in HBI’s accounts at BCB in Bermuda.

Messrs. Walsh and Taal’s application by summons (a copy of which can be accessed below at **Appendix 3**) sought relief including:

- Immediate payment to them of the lowest intermediate balance;
- No payment of any of the funds in Bermuda to the Liquidator; and,
- A direction that there should be a determination of all fraud issues by the Ontario Courts before their tracing issues could be tried by the Bermuda Court.

On the hearing of the applications, the JPLs relied upon the Affidavit of James Pomeroy. Messrs. Walsh and Taal relied on the Seventh and Eighth Walsh Affidavits filed earlier in the interpleader proceedings.

The Pomeroy Affidavit, based on records then in the JPLs' hands, deposed that the lowest intermediate balance figure should be \$4,422,863.43 based on the accounts being at their lowest balance as at August 4, 2003.

Counsel for the JPLs challenged the Seventh and Eighth Walsh Affidavits as disclosing no evidence in support of their proprietary claim to the funds in the HBI bank accounts. By way of response, counsel for Messrs. Walsh and Taal represented that they had not seen sufficient documents and bank records which they required before the issue of the amount of their proprietary claim could be resolved. Counsel for the JPLs, and on their instructions, offered to immediately make available to Mr. Walsh and/or his counsel all books and records seized by the Liquidator as soon as viewing could be arranged.

Counsel for the JPLs argued that, in view of the liquidation proceedings against HBI in St. Vincent and the ancillary proceedings in Bermuda which had the effect of staying the actions of all the parties to the interpleader proceedings, other than Messrs. Walsh and Taal who were no longer relevant, and what remained was the proprietary claim of Messrs. Walsh and Taal as plaintiffs against the Bank. The Court accepted that this was the case and accordingly made an order giving case management directions relating to the further prosecution of Messrs. Walsh and Taal's claim. A copy of the order can be accessed below.

The issue of an anti-suit injunction and the issue of possible jurisdiction of the Ontario Courts with respect to any matters in issue in the Bermuda proceeding was suspended pending the case management order which flowed out of the application (a copy of which can be accessed below at **Appendix 4**).

In summary, the order provided for:

- The proceedings to be reformatted with Messrs. Walsh and Taal as the plaintiffs and HBI, in Liquidation, as defendant,
- Inspection of HBI's documents by Messrs. Walsh and Taal within two weeks (which took place in May 2006),
- The filing of a Statement of Claim by Messrs. Walsh and Taal as Plaintiffs by June 1, 2006 (which took place; a copy of which can be accessed below at **Appendix 5**),
- Filing of a Defence by HBI by July 1, 2006 (which took place; a copy of which can be accessed below at **Appendix 6**),
- The Plaintiffs to give discovery by the provision of a list of documents and production of the said documents the Plaintiffs following the close of pleadings,
- A date to be fixed for a further directions hearing following discovery by Messrs. Walsh and Taal,
- And the other applications in the summonses of Messrs. Walsh and Taal, and HBI respectively were adjourned to the future directions hearing.

The JPLs served a request for further and better particulars of the Plaintiff's points of claim at the same time as they served the Bank's defence (a copy of the request can be accessed below at **Appendix 7**).

September 22, 2006 was fixed as the time to return before Kawaley J. for the hearing for further directions and directions for trial.

Notwithstanding requests for listing and production of documents for inspection and an answer to the request for particulars, the Plaintiffs failed to take any steps in that regard.

Over the summer months, the Liquidator and his advisors became aware that there were gaps in BCB account records for accounts held by HBI which might bear on the issue of the lowest intermediate balance in the accounts for the purposes of calculations of the amount to remain subject to the interim freeze pending trial. The JPLs requested production of further materials from BCB which, when reviewed by the Liquidator's staff and advisors, disclosed that the lowest balance in the accounts at BCB, upon which the lowest intermediate balance figure would be calculated, occurred in September 2000. This resulted in a recalculation of the lowest intermediate balance of \$4,246,007.30.

In September, 2006, the JPLs filed an application (a copy of the request can be accessed below at **Appendix 8**), returnable the same date as the directions hearing, September 22, 2006, seeking that an order that unless the Plaintiffs provided discovery and responded to the Bank's request for further and better particulars by September 29, 2006, their points of claim should be struck out.

Messrs. Walsh and Taal filed an application also returnable September 22, 2006 (a copy of the request can be accessed below at **Appendix 9**), seeking the following relief; a stay of the Bermuda proceeding pending an application being made in St. Vincent by Messrs. Walsh and Taal for "sanctions" against the Liquidator in relation to an alleged conflict of interest; or, in the alternative that the Plaintiffs be granted leave to file further evidence in relation to the applications of Messrs. Walsh and Taal, and the JPLs, which had been adjourned on April 27, 2006.

It was the Liquidator's view that it would cause the estate unnecessary expenses to participate in a wide reaching multi-party proceeding in Ontario in which the specific issues that were required to be adjudicated to resolve the interpleader matter in Bermuda would form only a minor part of the trial. Further, there could be significant delays in making this determination as the Ontario proceeding was outside the control of the JPLs, in a court to which the Liquidator had not submitted, and which may not have jurisdiction over the JPLs in any event.

At the hearing, the judge, from the Bench, dismissed the Plaintiffs' application for a stay of the proceedings pending resolution of the Plaintiffs' conflict allegation in St. Vincent. As the Judge was minded to grant the JPLs the order releasing the monies in excess of the lowest intermediate balance from the BCB accounts, Messrs. Walsh and Taal's counsel then made representations to the effect that Messrs. Walsh and Taal wanted an opportunity to argue that the amount of monies remaining frozen should not be the lowest intermediate balance calculated in the second Pomeroy affidavit, \$4,246,007.30, but approximately \$5.6 million and

to file further Affidavits (a copy of the affidavit can be accessed at **Appendix 10**). So as not to allow further delay, the JPLs agreed, if so ordered, to a payment out to the JPLs of all sums in excess of \$5.6 million without prejudice to their right to argue that the amount of the remaining subject to the interim freeze ought to be \$4,246,007.30. The Court so ordered.

The court directed that the Plaintiffs file a response to the request for further and better particulars and their list of documents within 28 days of September 22, 2006, and have their documents available forthwith. The court also granted the plaintiffs leave to file a reply to the defence within 28 days.

The Court reserved decision on the jurisdictional issues as to whether the fraud issues should be tried in Ontario and Bermuda, and by written decision of September 27, 2006 found that the proper forum for trial of all issues relating to the bank was Bermuda. In its ruling, the court gave a direction that the Plaintiffs file a summons for pre-trial directions within 28 days of September 27, 2006.

Copies of the ruling dated September 27, 2006 and the orders dated September 22, 2006 and September 27, 2006, can be accessed below at **Appendices 11** through **13** respectively).