

1 **IN THE GRAND COURT OF THE CAYMAN ISLANDS**

2 **FINANCIAL SERVICES DIVISION**

4 **FSD Nos. 60 and 61 of 2013 (AJJ)**

5 **The Hon Mr Justice Andrew J. Jones QC**

6 **In Chambers, 26th November 2013**

9 **IN THE MATTER OF THE BANKRUPTCY LAW (Cap.7) (1997 REVISION)**

11 **AND IN THE MATTER OF PATRICIA H. MILLARD, A DEBTOR**

13 **AND IN THE MATTER OF WILLIAM H. MILLARD, A DEBTOR**



16 **Appearances:**

17 Mr. Kyle Broadhurst of Broadhurst LLC for the Agents of the Trustee in Bankruptcy

18 Mr. Michael Mulligan of Conyers Dill & Pearman for the Auditor General of the Cayman
19 Islands

20 Mr James Corbett QC and Ms Rebecca Hume of Kobre & Kim for the Commonwealth of the
21 Northern Mariana Islands

25 **REASONS**

27 **Introduction**

- 29 1. This is an application for directions made by Messrs Kenneth Krys and Margo MacInnis
30 in their capacity as joint agents for the Trustee in Bankruptcy in respect of the
31 bankruptcies of Patricia H. Millard and her husband William H. Millard, whom I shall
32 refer to as "the Trustee's Agents" and "the Debtors" respectively. They ask for a
33 direction that the Auditor General shall not be required to audit the accounts of the
34 Trustee in Bankruptcy in respect of these estates, essentially on the ground that it would
35 service no useful purpose in circumstances where the administration has been delegated
36 to professional insolvency practitioners. The Auditor General's position is that he has a
37 statutory duty to audit these accounts and that this Court has no power to relieve him
38 from the performance of his duty. I agree with him for the following reasons.



1 **The applicable statutory provisions**

- 2
- 3 2. The office of Auditor General is established under the Constitution of the Cayman
- 4 Islands, section 114(3) of which states that –

5

6 *“The Auditor General shall have the power and responsibility to audit the public accounts of the*

7 *Cayman Islands and the accounts and financial dealings of all authorities, offices and*

8 *departments of Government and of all courts....”*

9

10 By section 60 of the Public Management and Finance Law (2005 Revision) the Auditor

11 General has a duty to audit the annual financial statements of the Judicial Administration,

12 but this provision does not expressly include auditing the accounts maintained by or on

13 behalf of the Trustee in Bankruptcy (which are of course wholly different from the

14 departmental financial statements). However, I think that auditing the Trustee’s accounts

15 must fall within the scope of his constitutional responsibility because Trustee in

16 Bankruptcy is, by section 12 of the Bankruptcy Law (1997 Revision), a public office

17 attached to the Grand Court.

- 18
- 19 3. Section 94 of the Bankruptcy Law (1997 Revision) states that –
- 20

21 *“The Trustee shall submit his accounts for audit at such times and in such manner as may be*

22 *prescribed.”*

23

24 Rules 58 and 79 of the Grand Court (Bankruptcy Rules), 1977 prescribe the timing and

25 the manner in which this shall be done, as follows -

26

27 *“58. The accounts of the Trustee shall be submitted to the Clerk, audited by the Auditor of the*

28 *Islands and approved and passed by the Judge in Chambers and before submission of the*

29 *accounts to the Judge, the Clerk shall examine the Record Book and shall note thereon any*

30 *matter which, in his opinion, calls for enquiry or explanation in connection with the due*

31 *administration of the estate, and the Record Book, with notes, if any, of the Clerk thereon, shall*

32 *be laid before the Judge for examination on the passing of the accounts.*

33

34 *“79. The Record Book, Cash Book, and the Trustee’s bank account shall be submitted to the*

35 *Auditor of the Islands during the first week in January and the first week in July each year for*

36 *audit.”*

37

- 38 4. The Trustee’s Agents accept that the Auditor General has authority to audit the accounts
- 39 of the Trustee in Bankruptcy relating to every bankrupt debtor’s estate, but their case is
- 40 that the Court has an overriding discretionary power, arising under section 5 of the
- 41 Bankruptcy Law (1997 Revision), to direct that the accounts prepared in respect any
- 42 particular estate need not be audited. Section 5 states that –
- 43

1 "5. Subject to this Law, the Court has full power to decide all questions of priorities, and all
2 other questions whatsoever whether of law or of fact, arising in any case of bankruptcy coming
3 with the cognizance of such Court, or which such Court may deem it expedient or necessary to
4 decide for the purpose of doing complete justice or making a complete distribution of property in
5 any such case; and the Court is not subject to be restrained in the exercise of its powers under
6 this Law by the order of any other Court, nor does appeal lie from the decisions of the Court,
7 except in the manner directed by or under the authority of this Law."

8
9 In my judgment section 94 is a mandatory provision. It provides that the Trustee in
10 Bankruptcy *shall* submit his accounts for audit and section 5 does not empower the Court
11 to waive this requirement. The only qualification is that the requirement to submit
12 accounts for audit shall be performed "at such times and in such manner as may be
13 prescribed". However, the word "prescribed" is defined by section 2 to mean "prescribed
14 by rules of Court" and the applicable rule making authority is the Grand Court Rules
15 Committee. Rules 58 and 79 are the applicable rules and I do not have any power to dis-
16 apply these rules or prescribe any modification of them, even if I was satisfied that their
17 strict application would serve no useful purpose in the circumstances of these particular
18 cases.

19 20 Application of Rules 58 and 79

- 21
22 5. For historical reasons the application of these rules is inherently difficult. The legislative
23 history of the Bankruptcy Law (1997 Revision) is described in *Al Sabah v. Grupo Torras*
24 *SA* [2004-05] CILR 373, per Lord Walker at paragraphs 11-22. In substance, it is a re-
25 enactment of the Jamaican Bankruptcy Law of 1880, although the Grand Court of the
26 Cayman Islands did not have any jurisdiction in bankruptcy until the enactment (as a
27 Jamaican statute) of the Cayman Islands Administration of Justice Law 1894. When the
28 Cayman Islands ceased to be dependency of Jamaica, the 1880 Law continued to apply
29 and was re-enacted (with minimal modification) as Chapter 7 of the Laws of the Cayman
30 Islands (Revised Edition) which came into force on 31st December 1963. By section 44 of
31 the Judicature (Administration of Justice) Law, which also came into force on 31st
32 December 1963 as Chapter 74 of the Laws of the Cayman Islands (Revised Edition), the
33 bankruptcy rules then in force in Jamaica continued to apply in this jurisdiction. They
34 continued to apply until 1977 when the Grand Court Rules Committee, which had been
35 created by the Grand Court Law (Law 8 of 1975), proceeded to make a series of rules of
36 court to replace the Jamaican rules. However, at that time there were no bankruptcy
37 proceedings pending before the Grand Court and the office of Trustee in Bankruptcy was
38 vacant. In these circumstances it is perhaps unsurprising that the Rules Committee chose
39 not to enact bespoke rules, but simply re-enacted the existing Jamaican rules as the Grand
40 Court (Bankruptcy) Rules 1977, which are still in force today. The office of Trustee in
41 Bankruptcy remained vacant until 22nd April 1980 when the Governor in Council
42 appointed the person for the time being holding the office of Clerk of the Courts to be

1 Trustee in Bankruptcy. Whether or not this appointment was prompted by the
2 presentation of a bankruptcy petition is not known. The first reported bankruptcy case is
3 *In Re Kruger* [1997] CILR 424 but it is not possible to say for certain whether this was in
4 fact the first time that the Grand Court had made an absolute order for bankruptcy.

5
6 6. The result of this legislative history is that the substantive bankruptcy law and associated
7 procedural rules applicable to the Cayman Islands today is that which was inherited from
8 Jamaica in 1963. This inevitably presents some difficulty for the Court when attempting
9 to apply these rules in circumstances which have changed significantly over the past 50
10 years. Today, the Trustee in Bankruptcy administers bankrupt estates in name only. All
11 the work is delegated to professional insolvency practitioners. Rule 79 requires that the
12 Trustee shall submit the "Record Book" and the "Cash Book" for audit twice a year. This
13 is a reference to books and records which must have existed and been maintained by the
14 Jamaican trustee in bankruptcy in 1963. No such books and records have ever been
15 created in this jurisdiction. Section 93 requires that all monies received by the Trustee in
16 Bankruptcy shall be paid into an account entitled "The Trustee in Bankruptcy Account"
17 maintained with the Government Savings Bank. This bank no longer exists and no such
18 account has ever been established with any other bank. All funds received in respect of
19 the Debtors' estates have been paid into a nominated account established with Bank of
20 Butterfield and controlled by Messrs Krys and MacInnis in their capacity as the Trustee's
21 agents.

22
23 7. Doing the best I can to apply Rules 58 and 79 today in a practical way, I propose to
24 make the following directions –

25
26 (1) The Trustee's Agents shall prepare reports and accounts for the period from
27 inception to 31 December 2013 and thereafter for each six month period ended 30
28 June and 31 December each year. I can only speculate about the form and content
29 of the "Record Book" and "Cash Book" maintained by the trustee in bankruptcy
30 in pre-1963 Jamaica. Suffice to say that I shall consider the Trustee's Agents to
31 have discharged their duty if they prepare reports and accounts which comply
32 with the requirements Order 10 of the Companies Winding Up Rules.

33
34 (2) The Trustee's Agents shall comply with Rule 79 by filing these reports and
35 accounts in Court and sending copies to the Auditor General within one month
36 after the applicable accounting dates, that is by the end of January and July each
37 year.

38
39 8. I have no jurisdiction to give any directions to the Auditor General about the manner in
40 which he will discharge his duty to audit these accounts. Nor would I wish to do so.

1 However, I think that it is relevant to make two further observations. First, in the present
2 context, the Auditor General's jurisdiction is limited to auditing the accounts of the
3 Trustee in Bankruptcy, for which purpose section 114(4) of the Constitution gives him
4 access to all books, records, reports and documents relating to these accounts, which
5 necessarily includes all documents created or received by Messrs Krys and MacInnis (and
6 their firm, Krys Global) in their capacity as the Trustee's Agents. He does not have any
7 right of access to *all* the books and records of Krys Global as if he were auditing that
8 firm's own financial statements. Second, the Auditor General has no power to charge fees
9 to the Debtors' estates. I appreciate that it is now the practice of Government to render
10 inter-departmental invoices in accordance with procedures established pursuant to the
11 Public Management and Finance Law (2010 Revision). However, any invoice rendered
12 by the Auditor General upon the Judicial Administration for auditing the Trustee in
13 Bankruptcy's accounts is done only for Government's internal management purposes and
14 does not result in any charge being made to the Debtors' estates.
15

- 16 9. Since this summons has raised a point of general application, my order and these reasons
17 will be treated as having been delivered in open court.
18

19 Order accordingly.
20

21
22 Dated this 29th day of November 2013

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28 **The Hon. Mr. Justice Andrew J. Jones QC**
29 **JUDGE OF THE GRAND COURT**

