

Fourth Report
of
Third Official Liquidator
of
Trade and Commerce Bank (In Official Liquidation)
to
the Grand Court of the Cayman Islands



August 31, 2011

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1. Introduction

- 1.1 This is the fourth report of Mr. Christopher Dorrien Johnson of Chris Johnson Associates Ltd., Elizabethan Square, 80 Shedden Road, George Town, Grand Cayman KY1-1104, Cayman Islands, the Third Official Liquidator (the “**Third Liquidator**”) of Trade and Commerce Bank (In Official Liquidation) (“**TCB**”). The report covers the period through August 31, 2011 from October 2, 2006, the date of the third report.
- 1.2 All figures stated within the report are in United States dollars, the currency of the liquidation, and capitalised terms bear the definitions given to them in the body of the report.

2. Background

- 2.1 On August 29, 2002 the Grand Court of the Cayman Islands (the “**Grand Court**”) ordered that TCB, a bank incorporated and licensed under the laws of the Cayman Islands, be wound up and the Third Liquidator be appointed to conduct *“an investigation into whether [TCB] has any claims against its former auditors ... and if so to prosecuting such claims against those auditors by way of court process or arbitration”*. The former auditors of TCB were Arthur Andersen LLP (“**Andersen**”) and Morris Brankin & Co. (“**Morris Brankin**”). Andersen audited the financial statements of TCB for, *inter alia*, the year ended December 31, 1999. Morris Brankin, the successor auditor to Andersen, audited the financial statements of TCB for the subsequent year, the year ended December 31, 2000, the last audit of the financial statements of TCB.
- 2.2 The Third Liquidator investigated the claims against Andersen and Morris Brankin and advised the TCB Liquidation Committee that the claims against Andersen and Morris Brankin should be prosecuted but was informed that there were insufficient funds available in the TCB liquidation estate to prosecute the claims.
- 2.3 With the approval of the TCB Liquidation Committee and after consultation with the First and Second Liquidators of TCB, the Third Liquidator made an application to the Grand Court for sanction of a legal assignment of the claims of TCB against Andersen and Morris Brankin to TCB Creditor Recoveries Ltd. (“**TCBCR**”) so that TCBCR could prosecute the two claims *“in consideration for paying over a share of any recoveries made”* to TCB pursuant to the terms of a Deed of Legal Assignment (the “**Legal Assignment**”) to be executed between TCB, the Third Liquidator and TCBCR.
- 2.4 On October 11, 2006, the Grand Court sanctioned the Legal Assignment and on October 12, 2006 the Legal Assignment was executed.

2.5 Under the terms of the Legal Assignment TCBCR undertook to fund the prosecution of the claims against Andersen and Morris Brankin and in the event of any recovery, including by settlement, TCBCR would retain one third of the "Proceeds" as defined in the Legal Assignment and an amount equal to the "Expenses" as defined in the Legal Assignment (or in the event that the "Expenses" should exceed \$5,000,000, the amount of \$5,000,000) with the balance of the proceeds (if any) to be distributed to TCB.

3. The Claim against Andersen (Cause No. 135 of 2006)

3.1 On April 7, 2006 a Writ was issued against Andersen in respect of its audit of the financial statements of TCB for the year ended December 31, 1999.

3.2 On October 3, 2006 the Grand Court gave TCB leave to serve the Writ out of the jurisdiction.

3.3 On October 6, 2006 the Writ was served on Andersen.

3.4 On October 12, 2006 the claim against Andersen was legally assigned to TCBCR.

3.5 On October 16, 2006 a Notice of the Legal Assignment was served on Andersen by TCBCR.

3.6 On March 5, 2007 a Statement of Claim was served on Andersen by TCBCR.

3.7 Andersen tried to obtain a stay of the claim on the basis of *forum non conveniens*. The application took place over 2 days in July 2007. Judgment was given in favour of TCBCR on August 1, 2007.

3.8 On December 18, 2007 Andersen served its Defence on TCBCR.

3.9 On May 28, 2008 a Request for Further and Better Particulars of the Defence was served on Andersen by TCBCR.

3.10 On November 7, 2008 further to a strike out application by Andersen upon reliance on the June 18, 2008 English Court of Appeal decision in *Moore Stephens (a firm) v. Stone & Rolls Limited (in liquidation)* [2008] EWCA Civ 644 that reversed the July 27, 2007 decision of Mr. Justice Langley in the English High Court ([2007] EWHC 1826 (Comm)), the claim of TCBCR against Andersen was struck out pursuant to the Order of Mrs. Justice Norma McIntosh (Acting Judge) of the Grand Court.

3.11 On May 12, 2009 a Consent Order was filed pursuant to which the parties agreed that the application of TCBCR for leave to appeal would be adjourned "*to be relisted on the first available date after the House of Lords has delivered its speeches in the matter of Moore Stephens (a firm) and Stone & Rolls (In Liquidation)*".

- 3.12 On July 30, 2009 the Appellate Committee of the House of Lords in *Moore Stephens (a firm) v. Stone & Rolls Limited (in liquidation)* [2009] UKHL 39 dismissed by a majority of 3 to 2 the appeal of Stone & Rolls Limited (in liquidation) against the June 18, 2008 decision of the English Court of Appeal.
 - 3.13 On November 12, 2010 Mr. Justice Angus Foster QC of the Grand Court refused the application of TCBCR for leave to appeal the November 7, 2008 Order of Mrs. Justice Norma McIntosh (Acting Judge).
 - 3.14 TCBCR renewed its application directly to the Court of Appeal, on paper. On March 3, 2011 the President of the Court of Appeal of the Cayman Islands granted TCBCR leave to appeal the November 7, 2008 Order of Mrs. Justice Norma McIntosh (Acting Judge).
 - 3.15 On March 28, 2011 the Claim of TCBCR against Andersen was settled on confidential terms favourable to both parties.
 - 3.16 On July 11, 2011 the Third Liquidator confirmed to TCBCR that the amount of \$251,347.21 to be distributed by TCBCR to the Third Liquidator was in accordance with the terms of the October 12, 2006 Deed of Legal Assignment and the March 28, 2011 confidential Deed of Settlement.
 - 3.17 On August 3, 2011 the Third Liquidator received from TCBCR a wire transfer of US\$251,347.21 into the US dollar savings TCB client account of the Third Liquidator at the Cayman Islands branch of the Royal Bank of Canada, from which account bank charges of US\$6.00 were deducted on August 3, 2011, leaving a net balance of US\$251,341.21 as of August 31, 2011.
4. The Claim against Morris Brankin (Cause No. 87 of 2007)
 - 4.1 As at October 12, 2006, the date of the Legal Assignment, a Writ had not been issued. On March 2, 2007 a Writ was issued against Morris Brankin in respect of its audit of the financial statements of TCB for the year ended December 31, 2000.
 - 4.2 On June 28, 2007 the Writ was served by TCBCR.
 - 4.3 On August 9, 2007 a Statement of Claim was served by TCBCR.
 - 4.4 On November 19, 2008 a Consent Order was filed under which it was ordered, *inter alia*, that “1. Messrs Johnson and Carson be released from Cause No. 87 of 2007 and shall take no further part in those proceedings. 2. The name of the Defendant be amended to Morris Brankin & Co (a former partnership). 3. The claim against the remaining partners of Morris Brankin & Co, who have been served (namely Messrs Morris and Cottingham) do continue under the

Amended Statement of Claim, a draft of which is attached hereto. References hereafter in this Order to the Defendant are references to Messrs Morris and Cottingham in their capacity as former partners in Morris Brankin & Co. 4. The Defendant shall file and serve a Defence within 31 days of receipt of a sealed copy of this Order.” No Defence has been served by Morris Brankin.

- 4.5 In January 2009 by mutual consent the Claim against Morris Brankin was stayed, pending the appeal by TCBCR against the November 7, 2008 order of Mrs. Justice Norma McIntosh (Acting Judge) in the Andersen Claim.
- 4.6 On July 11, 2011 thirty days' written notice was given to Morris Brankin that TCBCR intends to proceed with its Claim against Morris Brankin (namely Messrs. Morris and Cottingham).
- 4.7 On August 17, 2011 the stay was reinstated in order to allow for the possibility of a without prejudice meeting, which has not yet taken place as of August 31, 2011.