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Defendant
Dated
Filed

STATEMENT OF [redacted]

IN THE SUPREME COURT OF JUDICATURE OF JAMAIC A
CLAIM NO [redacted]

BETWEEN [redacted] (In Receivership)

CLAIMANT

AND [redacted] DEFENDANT

SUPREME COURT * JAN 21 2005 * CIVIL DIVISION

RECEIVED
LOMINO GORDON-PALOMINO
ATTORNEYS-AT-LAW
24/1/05

CONSOLIDATED WITH

CLAIM NO [redacted]

BETWEEN [redacted]
(In Receivership) 1ST CLAIMANT

A N D [redacted]
(in Receivership) 2"d CLAIMANT

[redacted] 1ST DEFENDANT

A N D

PRICE WATERHOUSE

A N D COOPERS LTD. 2ND DEFENDANT

PRICE WATERHOUSE COOPERS

A N D (A Firm) 3RD DEFENDANT

A N ID [redacted] 4TH DEFENDANT

AND

CLAIM NO, [redacted]

BETWEEN [redacted]
CLAIMANT

A N D [redacted] 1ST DEFENDANT

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t N D JOHN LEE 2ND DEFENDANT

1, THE RECEIVER, do hereby state as follows:

I reside and have my true piace of abode at apartment [redacted] in the Parish of St. Andrew; my postal address for the purpose of these proceedings is c/o PricewaterhouseCoopers, Scotiabank Centre, Duke and Port Royal ---

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2. I am a Partner of PricewaterhouseCoopers. I attach a copy of my CV, which sets out my professional background and incorporate same as part of my evidence herein.

3. I give this statement for the purposes of this claim and verify that the statements made herein are true.

4. National Commercial Bank Jamaica Limited (NCB) approached Price Waterhouse (now known as PricewaterhouseCoopers and hereinafter referred to as "PVT, "PWC" or the firm") through our partner Mr. John Lee to provide receivership services in respect of DEBTOR Jamaica Limited and DEBTOR Limited. Since Mr. Lee was not

available to do this assignment, it was agreed between Mr. Lee and

NCB officials that I would instead be appointed as the Receiver/Manager, as reported to me by Mr. Lee.

5. At the commencement of the Receivership I discussed with NCB representatives, in particular Mr. Dunbar McFarlane, the then Managing Director of NCB Group Limited, Mr. Mitch Stephenson, Mr. Chester Giddarie, and Mr. Theo Golding, the proposed activities I intended to undertake as the Receiver, which included discussions about certain specific functions that would be performed by various members of the PwC personnel that I would utilise and what services would be utilized for what purposes from other suppliers including law firms and other organisations. Details of some of the matters discussed and agreed are to be found in my letter dated March 6, 1998, which was prior to the appointment.

6 On several occasions leading to the appointment it was agreed between NCB and I that PwC resources would be utilized by me for the purposes of the Receivership. PwC is usually approached by organizations like NCB to do Receiverships and other complex assignments because of the high standards, personnel and resources that the firm has to offer and its reputation for getting the fob done at a competitive cost. However the

company or the firm could not be appointed Receiver so one of its partners had to be.

7 I was appointed Receiver by a Notice of Appointment dated March 9, 1998 under Deeds of Debenture dated June 28, 1995 and July 19, 1997 and identified in such documents as 'Richard Dotivner of Price Waterhouse". 1 was provided with an Indemnity by the holders of record of the relevant DEBTOR and DEBTOR debentures and Recon Trust Limited (a subsidiary of FINSAC with which NCB was

fihen_ kn_Mn to. be i n negotiation--concernang he t a - a q . on h_ rn ____ debentures) dated March 9,1998 and consequent upon the winding up order of DEBTOR on December 10, 1998, I was given a further indemnity by the same parties in or about April 1999. Both of these indemnities identified me as "THE RECEIVER of Price Waterhouse".

8. I undertook the receivership and prepared reports to the debenture holder when appropriate. In my first Receiver's report I referred to telephone conversations and a meeting with NCB of April 2, 1998 in which 1 had again discussed with NCB personnel the status of the Receivership and further intended action for the receivership. In the telephone conversations and the meeting I reported some of the matters contained in that report and assured the debenture holder that we were in control of the assets.

9. When I started these receiverships, as in the case of other receiverships, I had no certain knowledge of what I would find or how long the receivership would take. My objective was to find a buyer as soon as possible. Our incentive to do this is partly for reputational purposes of the firm and myself and partly because long receiverships

bring about vastly more risks than short ones. None of my receiverships before DEBTOR and DEBTOR were protracted as far as the sale of thebusineueswere con,ce:r_ne-d: ---A-fte:r-the sales-o3

assets are concluded receiverships do continue because of claims for refunds of transfer tax that can stay open for years, but the major risks attached to the assignment are over when the assets are sold and no longer managed by the Receiver. It was necessary for it to be decided at some point whether to shut down or continue the business. It was in this connection that the hiving down process was researched and discussed with NCB from the outset. In my letter of March 6, 1998 to Mr. Dunbar McFarlane, I enclosed a document, which sets out some advantages to the hiving down process which is to enable the continuation of the business operations of a company in receivership

through a subsidiary company with limited liability in the event that the company in receivership is put into liquidation by another creditor after the receivership commences. Doing this is designed to keep the options of continuance or closure open, in order to maximise the

proceeds of the sale of the business, either as a going-concern, or

from the scrap value of its assets, and also to make available a debtfree corporate vehicle for sale to third parties instead of the sale of the assets of the company in receivership depending on the preference of the put·chaser.

10. From the earliest stages of the receivership I stated my desire to create a new subsidiary of each of the companies in receivership for the purpose *of hiving down and* reported *on* this *in my* November 1998 report. In my letter dated June 15, 1998 to NCB, I indicated that to hive down the companies to the new subsidiaries it would involve the transfer of the companies' assets and business to them which may be our best option to limit the exposure arising of the debenture holder from trading as a principal with the Receiver being an agent of the debenture holder instead of being an agent of the company in receivership, in the event that a liquidation proceedings might commence during the receivership.

11. A consequence of the hiving down process is that the newly formed subsidiary or subsidiaries would be indebted to their respective parents (the companies in receivership) for the value of the undertakings transferred. If the subsidiaries paid expenses on behalf of their parents, such as Receivers' fees, such payments would in the final analysis be applied in reduction of such indebtedness

12. In summary, the main advantages of the hiving down process are that (1) A purchaser could buy shares in an established company instead of the assets, which would not otherwise be the case since 1 as Receiver could not sell the shares of the company in receivership or issue new shares for that company. The new company would have none of the actual or contingent liabilities (including redundancy) which the parent

ad it servres to time `he exposure of the debenture holder if the company in receivership is put into liquidation as explained in 10 above.

13. There was a long history of dealings between NCB, PwC and myself from which there was a familiarity with the rates structure of the firm. The history of dealings included prior receiverships, external audits of NCB, consultancy services, and tax advice for NCB, PWIPwC has conducted the audits of NCB for over 20 years with the fees being negotiated annually, and the firm has conducted valuation assignments for which I personally have been responsible, Information Technology consultancy, and change management services. Messrs. Meikle, Creary and Francis were all engaged by me at points in the receivership to assist with the production side, and records of their time spent on the receivership were available to the debenture holder upon request and in fact were readily and voluntarily provided to the new

debenture holder prior to any claim being made in respect of the conduct of the receivership.

14. PwC charged the receivership for the services of Messrs. Meikle, Francis & Creary in the same manner as the services of other personnel of PwC including myself, which is that the charges are not limited to the direct compensation paid to those members of staff but is set at a rate that allows for the recovery of all costs of employment, overheads including costs of general office management, risk management, technology, insurance and other costs and for the making of a profit by PwC. The figures charged for Messrs. Meikle, Francis and Creary were within the rates in the market place and consistent with rates used for other firm staff of similar seniority and experience. Mr. Meikle was employed by Price Waterhouse just prior to my appointment as receiver of these companies and the firm was

liable to pay him for his time spent prior to the appointment even if the appointment had not been made.

15. As Receiver i could have functioned as the CEO with day to day responsibility for everything including purchasing, marketing, customer relations, production, labour relations and general office management as well as dealing with unsecured pre-receivership creditors and detailed negotiations with potential purchasers or instead, delegated

the tasks whilst retaining the responsibilities through setting policy and monitoring. Some receivers choose to carry out such executive tasks themselves. However, as my billing rate was over 60% higher than those of Messrs Meikle, Creary or Francis, I delegated one or other of those persons to perform those functions at different times and gave them the power to commit the Receivership within limits. Other PW/PwC staff were delegated other functions as well, in the areas of finance andaccounting, information technology human resource

management, dialogue and follow-up with potential purchasers and the secured creditors, under my general oversight and direction. Such persons reported directly to me in respect of their delegated responsibilities. As a result, the time spent by me personally on the receivership could be and was devoted to major policy matters, legal matters, approving major commitments as well as controlling all disbursements and credit notes, and negotiating the high-level points with potential purchasers and the time spent by me was charged to the receivership. My working days were by no means spent exclusively on these two receiverships although I could and would have done so had I not been able to delegate the tasks as aforesaid, particularly those carried out by Messrs. Meikle, Francis and Creary. If I was unavailable to sign cheques from time to time, any of the partners in the firm were empowered to do so and did from time to time, charging the

receivership with their time spent for signing cheques. I fully expected

that the receivership would be quickly concluded, as did Mr. Meikle, Unfortunately for reasons described later herein a quick sale was not possible due to the repeated intervention of FINSAC when it was the debenture holder. Mr. Meikle could not continue at a cedain point due to an illness in his family and Mr. Francis was retained by Price Waterhouse and supplied to me. However Mr. Francis was needed for another receivership being conducted by the firm and Mr. Creary was

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not paid by the receiverships, All of the payments made to Messrs. Meikle, Francis and Creary were made by Price Waterhouse cheques with deductions from their compensation for income tax being withheld by the firm and paid to the tax authorities. The only charges ever made to the Receivership in respect of these three individuals were for their time as billed by Price Waterhouse or PricewaterhouseCoopers

and possibly travel expenses in accordance with the firm's practice for all staff who had to travel to Spanish Town in connection with the assignment.

16. It was necessary for me to engage key people who were (1) competent, (2) trusted by me (3) had no potential agenda that would be inconsistent with the interests of the debenture holder and (4) loyal to me, and in particular not loyal to any of the directors and/or

shareholders of the company. In the case of these particular

receiverships there was a bitter feud in process between the directors and sharehoiders as was told to me by NCB personnel and as reported in the press, and the issue of there being no loyalty to either side in that dispute was important. Partly as a result of this_but for other important reasons as well the employment of [redacted], a director, shareholder and the chief executive officer who had devoted most of his time to production, sales and procurement, was terminated W h ft:s tLoLtb -e.oe-ive-f^{g} =r;== tfie=s'eni r-irrrill^{o}oye-e-s whu appeared to have loyalties to [redacted] were also terminated including the financial controller and the production manager. I was afraid of sabotage of various types in the context of the dispute

between the owners. The human resources manager was terminated as well though I did not doubt her loyalty to me and considered her to be extremely competent, as the workload of the position did not justify a full-time employee. Mr. Meikle assumed the responsibilities for overseeing the production, sales, procurement, maintenance, human resources and industrial relations aspects of the operation and other PwC staffers were assigned leadership responsibilities for finance and accounting. On an ad-hoc basis, other firm staff were assigned tax, corporate secretarial, information technology and human resources tasks. All of these persons reported directly to me Since they were on PwC's payroll they did not have agendas that included popularity-seeking with the DEBTOR and DEBTOR employees or that

included *enhanced* prospects *of an automatic career with a new owner* as a consequence of being incumbent employees. The latter could have resulted in conflicts of interest when they dealt with potential purchasers during due diligence processes. A receiver, is personally liable on contracts entered into by him or with his authority (unless such liability is expressly excluded) and therefore needs to be sure that

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17. The business of the DEBTOR Group was extensive and complicated. It included manufacturing businesses making a wide range of products, with myriad suppliers and customers. The businesses called for experienced and qualified senior executive skills to match the job at hand on my behalf. That is why Mr. Vernon Meikle, former Chief Executive of Esso in Jamaica, came to be part of the team supplied by Price Waterhouse and following him Mr. Francis and then Mr. Creary both of whose credentials were also appropriate. Mr. Meikle's inclusion on the team was advised to NCB before the Receivership started as we had already engaged him and more particularly in letter dated March 6, 1998 and later in my reports dated April 23, 1998 and November 1998.

the persons who commit his credit as receiver of the company are g,;(*cry*

18. At no time did the firm or. receive any secret profit. Any profit rnade was consistent with our usual practice in receivership and consultancy assignments and not objected to by the debenture holders who were fully aware that Mr. Meikle and his successors were part of the team supplied by Price Waterhouse. For a variety of assignments including receiverships PW and PwC has engaged and still engages contractors for certain aspects of assignments for which we take the responsibility fn-de-:v.r=of=s*rvi-c to=Tiens-t#e=ds=of=carom=t f - f i r m - a ye marked-up by the firm. This case was no different.

19. I also indicated in my March 6, 1998 letter to NCB that an overdraft facility needed to be in place prior to the commencement of the Receivership. When the receivership began there was a mere $14,000 in the bank. Accordingly, when the receivership started NCB specifically approved overdraft facilities of $5 million for Thermo-Plastics and $1 million for DEBTOR and guarantee facilities of US$200,000 and US$100,000 for them respectively in the absence of knowing precisely how much would be needed for operations in the short term and how long the receivership would have to last before a buyer could be found. The facilities were requested and granted until September 1998, reflecting my hope and expectation that we could have found buyers by then. The proceeds of the account were used solely for the operation of the business of the companies as proposed

in the outline of the receivership agreed with the debenture holder. At no time was there any objection or disapproval at the manner in which the overdrafts were created or managed or the manner of the receivership in general, though on occasion Recon Trust appeared to be dissatisfied with the frequency of reports close to the time that, as I subsequently realized, negotiations for the sale of the debt to Mr. Joslin's group were in process. The extent of the eventual overdraft _sefluit mant-was -clue to the-rat-us

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20. In my November 1998 report I again discussed my strategy to best maximize the recovery of the sums due to the debenture holder, namely by sale of the businesses as going concerns. I requested an urgent meeting to discuss the matter of the companies' finances. I stated in that report that if nothing were done about the finances of the companies the plant might have to stay closed after the customary Christmas season closure. I further reported on this in a letter dated November 19, 1998. By this time FINSAC was attempting to reach an agreement with NIBJ concerning the sale of the debenture as set out below.

21. I indicated the state of the overdrafts in my report of April 29, 1999 in

which I stated that for the period to April 27, 1999 Thermo Plastics had

incurred bank overdrafts of $7.7 million and DEBTOR had a bank overdraft of $1.2 million for the same period.

22. I also indicated that sales for January and February 1999_were how due to low stock, which was caused by delays in obtaining approvals for bank guarantees and overdraft facilities from FINSAC and NCB respectively. I explained that temporary banking facilities were needed in order to access raw materials on a timely basis through guarantees, when there is the potential for payback.

23. There were several oral discussions between the debenture holder and myself and my staff in between the reports. In my report of November 10, 1999 I stated that there were continued problems in obtaining renewed and additional overdraft facilities and bank guarantees from NCB.

24, These problems were said by NCB to be due to the fact that NCB from whom the facilities were requested did not receive satisfactory responses from FINSAC during this period as to whether there would be a guarantee of the overdraft by FINSAC. FINSAC in turn blamed this on the need for the Bank of Jamaica to approve such a commitment from FINSAC and they were awaiting a reply. I had requested overdraft facilities of approximately $18 million for Thermo-

',Plastics and $7 million for Has Pak and bank guarantee facilities of US$200,000 for DEBTOR and US$100,000 for Plas Pak.

25, Initially, NOB approved our request pending final approval from FINSAC. In good faith at the end of July 1999 I took the precautionary decision, in the event that final approval from the Bank of Jamaica for the NCB overdraft would not be obtained, to open current accounts at theBank=of N-ova--Scoti J ica-Eimi· (B-N-S) vert-u r}essa- banking and cash flow problems, which would restrict my ability to operate the companies as I had been instructed to do, which instructions were not rescinded as of that time or subsequently despite the fact that the new banking arrangements involving BNS had been reported to the debenture holder. Proceeds from sales were lodged to this BNS account to cover operating expenditures that were also paid from this account. Had I instead lodged the proceeds from sales to reduce the NCB overdraft there would have been a reduction of interest on the NCB overdraft, but there would be no cash to operate the businesses and the businesses would have had to close, as NCB would not have allowed further spending from the overdraft as it was not guaranteed. This was reported in writing to FINSAC in my report dated November 10 1999, but Mr. Hylton of FINSAC was informed by me on June 29 1999 at a meeting at his office that my only resort to be able to continue trading if the facilities were not approved would be to

open a new account at BNS and he did not disagree. I said this because, if there was an overdraft with NCB that was not approved and I had no banking facility elsewhere, any lodgement made would have been applied against that debt and not available to-pay operating expenses. Without the ability to produce and sell products I would have closed down the operations immediately and collected whatever receivables from prior sales that we could, which would have been e iffj*uf jn c f rarer-custorner's-wnuId-A =1`on-0T-ehave toe-prosd their credit with us. Such collections and whatever could be realized from selling the assets over some protracted period thereafter (there would be no "businesses" to sell at that point) would be all that would have been available to reduce the NCB facility. Once the business was closed, its value as a going-concern would plummet or be wiped out, as customers would find new suppliers and the workforce would have found new employment.

26. In August 1999, months after the need for the facilities had been reported and the request made, I was notified by NCB that our request to have the facilities extended was declined because NCB was not given the HNSAC guarantees. The inordinate delay in reaching this decision proved very costly since 1 was unable to source raw materials on a timely basis from overseas suppliers who required either an advance payment or a bank guarantee which resulted in stop/start

production and, as a result of the uncertainty as to whether I would have the finance to source sufficient raw materials, I was unable to service or commit to several large contracts which resulted in their loss. It so happens that this notification coincided with,an instruction to me from FINSAC that I should resume my disposal strategy (which was to sell the business as a going-concern) as stated below which had followed an instruction in March 1999 that I should curtail selling

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was in this very period of negotiation between those entities that my struggle to obtain the financing facility was taking place with the delay being attributed to the Bank of Jamaica.

27. The debenture holder was and or should have been fully aware of the consequences of the new banking arrangements. I reported on November 10 1999 that a monthly overdraft interest cost of approximately $0.8 million for Thermo Plastics and $0.3 million for Plas Pak continued whilst there were also operating current accounts at BNS with cash balances totaling $10.6 million at that particular date. Such a cash balance was not high in relation to the needs of the businesses and the balance tended to fluctuate widely. Had the balance on the BNS account at any particular point in time been used to reduce the NCB overdraft, closure of the businesses would have been the result and this was not an option at my disposal since my

standing instructions were to continue operations and I had no reason to suggest that closure Was a better option during this period.

28. In my April 11, 2000 report I indicated that I was continuing to operate both plants and that the outstanding overdraft still incurred a monthly interest cost in excess of $1 million. I reported that at March 31, 2000 there were approximately $2.5 million cash in the BNS accounts and .t e oover-$-3 million for ThermoPlastics and $9.7 million for Plas Pak. Since the rate of accrual of interest had been thus notified to the debenture holder no further reports on the consequences of the new banking arrangements was considered necessary.

29. The length of the Receivership during which the NCB overdraft interest and our fees (including those applicable to Mr. Creary) continued to be incurred was due to the fact the debenture holder FINSAC instructed me, on several widely separated occasions, to facilitate the various efforts of National Investment Bank (NIBJ), to buy the debenture or the businesses, and also not to entertain other bids at various times that were coincident with these efforts, which required me to continue the receivership instead of selling the business as I could have at various times to Omni Industries. When the several takeover offers on the table by NIBJ were to be by way of the purchase of the debenture I

was not involved in those protracted and unfruitful negotiations because, in the case of that mechanism, it was a matter solely between FINSAC and NIBJ, as the debenture holder and the potential purchaser of the debenture respectively.

30. The sequence of events to do with the intervention of FINSAC started when I was called to a meeting at Mr. Theo Golding's office at NCB

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=and attended requested to comment on a proposal from NIBJ and to defer putting the businesses to the market. In a follow-up letter to the attendees of that meeting dated June 15 1998 1 commented on the mechanics that could be employed by any potential purchaser and the advantages and disadvantages of each method to the purchaser given the constraints under which a receiver had to operate. I made it quite clear in that letter that a sole-source bidding arrangement in respect of the assets would not be acceptable unless all creditors were satisfied and I advised that a sale of the debentures would not really be my business but that of the debenture holder, the owner of the debt. In a report to the debenture holder dated November 1998, I stated that NIBJ's due diligence team, that visited the plant included a former employee of DEBTOR who traveled to Jamaica for the purpose and stayed at the residence of one of the feuding [redacted] members

referred to earlier, and that this gave rise to rumors, which discredited the bidding process.

31, At a meeting on November 18, 1998 at FINSAC, which was attended by NCB representatives, as confirmed in a letter to Mrs. Audrey Robinson of FINSAC in a letter dated November 19 1998, I was advised that I was thenceforth to report to FINSAC as the debenture had been transferred to them by NCB. Up until then I regarded NCB as the debenture holder and thus would not have taken instructions from FINSAC. The purpose of the meeting with FINSAC was to provide an update on the conduct of the receivership on the transfer of the debenture and confirm the strategy of continuing to operate the businesses rather than close them down. I was told at that time that the negotiations with NIBJ for the purchase of the debenture were still in process but I was free to seek other bids and negotiate with bidders, as FINSAC was not yet content with the terms offered by NIBJ for the purchase of the debenture.

32. On January 12, 1999 I was called to a meeting at the Prime Minister's office, which was attended by Mr. Patrick Hylton of Finsac, Ministers Paul Robertson and Horace Clarke, Mr. Nathan Richards, Mr. Dennis Morrison and Mr. Sanderson of the National Workers' Union. I informed the meeting that there was then a deadline of January 15,

1999 for the submission of bids to purchase the enterprises and we had not heard whether NIBJ was going to purchase the debenture from FINSAC.

33. On January 13, 1999 Mr. Patrick Hylton wrote to me requesting that the deadline for the decision to dispose" should be extended to February 28, 1999, which was a Saturday.

34. At a meeting held at NIBJ on February 24, 1999 in response to my request for an update on the state of negotiations between NIBJ and FINSAC since I was in the final stages of negotiation with another bidder 1 was informed by Mr. Gavin Chen that NIBJ still wished to purchase the debenture. I pointed out that there was now a deadline of March 3, 1999 for the submission of bids. I selected that date following Mr. Hylton's instructions of January 13, 1999 that the date should be extended to February 28, 1999 because on February 22,

1999 I had a meeting at Omni Industries (a bidder) with Mr. Berghermier who told me that he was getting a letter of comfort from his bank and needed a week for this, so I allowed a few extra days and set the new deadline as March 3, 1999.

35. On March 2, 1999 I was copied with a letter from NIBJ to FINSAC requesting that FINSAC convey "the necessary information regarding the cessation of any other activity by the present receiver to sell all or part of the present operations".

36. On March 3, 1999 I was instructed by Mr. Patrick Hylton of FINSAC on the telephone to suspend the sale of the businesses to allow FINSAC the opportunity to review an offer from NIBJ to purchase the debenture. I then telephoned Mr. Berghermier of Omni Industries, from whom I had not yet heard whether he had received the necessary banking facilities, in order to ensure that he did not incur any commitment fees or other expenses in connection with his offer. He reacted with expressions of frustration. On March 4, 1999 1 issued a press release explaining that since there had been a notification to the Receiver by FINSAC that it was considering an offer to buy the debt, the sale process had been put on hold. This was done after a telephone discussion with Mr. Hylton of FINSAC because the media had broadcast stories discrediting the bidding process that appeared to have originated from Omni.

37. In a letter dated June 10, 1999 I wrote Mr. Hylton requesting instructions as to whether i could resume negotiations with prospective

purchasers, having had no further news regarding the negotiations between FINSAC and NIBJ regarding the purchase of the debenture. There was no reply.

38. On August 13, 1999 I received a letter from FINSAC referring to their letter of January 13, 1999 and asking me to continue my disposal strategy. I went back to the market and on September 17,1999 the companae doflaceiv.e .zm5=-ad orn ed in=Ehe n w paper fhiough I feared that the response would be poor as the bidding process had been discredited and the businesses were now "damaged goods". Further, as it would be obvious to potential bidders that a deal could not be struck between FINSAC and NIBJ, my negotiating position had been considerably weakened. There were newspaper articles giving further publicity to the fact that the companies were again in the market.

39. On October 8, 1999 I received an offer for the purchase of the assets by NIBJ. This was the first time that NIBJ was offering to buy the assets as opposed to the debenture. The same day an assistant of mine wrote to NIBJ on my instructions asking for clarification (so we could determine that this was truly an offer for assets and not the debenture) and informing them that the current round of bidding would not be closed until October 29, 1999,

40. In *my* November *10, 1999* report I indicated *that if the* NIBJ *bid was* really for the assets and not the debenture, the other bid was superior. This is so because if the bid was for the assets the debenture holder would only receive the proceeds net of deductions such as prior ranking creditors of which there were several. On the other hand if the bid of the same amount was for the debenture itself then the debenture

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older would receive the proceeds gross.

41. On November 17, 1999 I wrote to Mr. Patrick Hylton informing him that NIBJ had revised its offer whereby it was once again for the debenture and not the assets and the offer should therefore have been addressed to FINSAC and not the Receiver.

42. On December 7, 1999 I received an unsolicited offer from Ebenezer International Development Organization for the purchase of the assets.

43. In my January 31, 2000 report I confirmed being advised that NIBJ had withdrawn its offer to FINSAC and that I had therefore renewed efforts to sell the assets.

44. In a letter of February 10, 2000 from Refin and copied to FINSAC, I was instructed that February 29, 2000 was to be the official closing

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45. In a letter dated April 7, 2000 from FINSAC it was stated, "Further having agreed that expressions of interest to purchase the companies will not be entertained beyond February 29, 2000, we must now establish a practical timetable for termination". 1 did not consider that there had been an agreement on this point on my part; I had been so instructed as far as I was concerned.

46. On July 28, 2000 Mr. Patrick Hylton wrote requesting me to facilitate a new NIBJ due diligence team in respect of an offer to purchase the assets and also instructing that he had written to NIBJ urging them to complete the contract as soon as possible. On August 3, 2000 I wrote to Mr. Patrick Hylton indicating my willingness to cooperate with NIBJ but pointed out that two other offers were now on the table. These

offers were unsolicited. NIBJ wrote to me by letter dated August 4, 2000 making an offer for the assets and informing that it was their intention that the [redacted] would be offered the right to purchase shares in the new company that would be used to acquire the assets. This information did not influence my effort to carry through the bidding process and I did not consider it to be my business what action NIBJ might take following its proposed acquisition,

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47. On September 6, 2000 NIBJ wrote requesting exclusivity in negotiations

48. On September 7, 2000 I replied to NIBJ declining exclusivity because other negotiations were in progress.

49. On October 2, 2000 I refused Ebenezer's request for extension of a deadline of October 6, 2000 as it was by then apparent given their numerous broken promises and from other knowledge concerning that organization to do with an internal power struggle that the chance of completion with them was remote and causing us to waste our time and incur legal fees.

50. I received a letter dated October 24, 2000 from Omni Industries making a new offer.

51. On November 28, 2000 NIBJ wrote to me revising their offer and again to request exclusivity.

52. On December 15, 2000 I received a letter from Refin requesting details of the Omni and NIBJ offers.

53. In February 2001 I was in correspondence with NIBJ as regards aspects of the draft agreement in particular the issue of the redundancy payments.

54. On Mareh 22, 2001 I wrote to Finsac seeking instructions on an aspect of the draft agreement with NIBJ.

55. On May 30, 2001 Finsac wrote requesting outstanding Receiver's report.

56. I reported on the proposed sale to NIBJ by report dated June 20, 2001, which was faxed to Mrs. Audrey Robinson of Finsac.

57. All requests by Finsac for Receiver's report were met by either regular oral or written updates with Finsac personal as appropnate._..

58. Between December 2000 and July 2001 generally I was in negotiations with NIBJ to purchase the assets of the company, which offer I considered better than the October offer from Omni because the present day value of the NIBJ offer was superior than that of the Omni offer.

59. The Agreement with NIBJ was entered July 16, 2001 and NIBJ thereby took possession of the operations. After th·it point I had nothing to report as regards the operations of the business, as this had been taken over.

60. Following the execution of the Agreement I paid out the redundancies

and carried out the matters as stated in the agreement, except that the

closure of the pension scheme had not been completed pending work required to be done by the scheme's manager, Guardian Life.

61. On December 6, 2001 I wrote to FINSAC in relation to their letter to Myers Fletcher & Gordon of December 3, 2001 explaining why certain of FINSAC's conditions for releasing security to complete the sale were -Lam a.f4=-=1s=-1- t*vap*or* ed under only one of several debentures all held by FINSAC, FINSAC had the power to delay the completion by not issuing the releases required in respect of the other debentures.

62. There was then a protracted period of negotiasion between FINSAC and I as to what funds could be paid over on the closing of the transaction given the need for me to retain sufficient funds to settle the entitlements of prior ranking creditors to the debenture holder, including the tax authorities. An amount was agreed per FINSAC's letter to me dated December 21, 2001, The next thing I knew, by means of a letter sent by FINSAC to my attorneys dated February 5, 2002, is that the debt was sold and all matters would now be handled by Dennis Joslin Jamaica Limited. Up to this tim€ I vies not aware that this debt was to be transferred yet again. On March 27, 2002 I was officially notified that the debentures had beecc ,,old to Jamaican Redevelopment Foundation Inc. as of February 1, 2002.

63. On April 5, 2002 Mr. Dennis Joslin telephoned me with other parties on his end of the telephone line to renegotiate the agreement I had reached with FINS/1C per the letter of December 21, 2001 referred to above regarding the quantum of funds to be released, as Joslin now had to sign the releases from the debentures that would enable the NIBJ transaction to be finalized so that the final balance due from the

him the entire proceeds of the final NIBJ payment less our outstanding fees and said that if I did so no one would end up being sued, which latter statement I did not understand and considered spurious but menacing. I told him this was impossible and why, but he was adamant and the conversation took an unpleasant turn. I turned to FINSAC orally and in writing on April 9 and 22, 2002 for assistance with the discussions with Joslin in response to which I received a specious letter dated April 29, 2002 and to which 1 replied on April 30, 2002. On April 26, 2002 Mr. Joslin and I agreed on the quantum of the distribution but I was advised by my attorneys to clear it with FINSAC

who had indemnified me, which request I made by fax to Mr. Patrick Hylton on June 5, 2002. He replied on June 11, 2002 curtly and dismissively without providing the clearance. In the meantime NIBJ was now threatening me with a suit for specific performance of the

closure of the sale. I was in a pincer between the combined forces of

NIBJ, FINSAC and Joslin, pressuring me to take the unacceptable risk of distributing more than was prudent, which would have benefited FINSAC and Joslin (by virtue of their agreement to share excess *recoveries), with* NIBJ *having a* common *interest as a government* entity with Finsac The only way out, as I suggested to Mr. Joslin, was for me to be out of the picture freeing Mr. Joslin to find a compliant receiver to do his bidding as it was clear that Joslin would not be

it c4rtogive i reaiTedemnity nor would I be inclined to accept one from him, and FINSAC had refused to do so

64. Mr. Joslin subsequently appointed Mr. Douglas Chambers as the new Receiver and I met with Mr. Chambers on June 12, 2002. I handed over copies and originals of all documents in my possession to Mr. Chambers and also volunteered him access to all correspondence files to do with the receivership at the offices of my attorneys. Mr. Chambers was told that there was approximately $2 million at BNS representing all of the receivership funds even though the firm was owed some $6 million at the time for work done. Shortly afterwards I learned that Mr. Chambers had without my knowledge changed control of the bank account to himself. Mr. Chamber's had assured me that our bill would be settled when the NIBJ transaction was finalised. PricewaterhouseCoopers is owed $6,810,668.78 for receivership fees for which I sent invoices and further amounts for the time spent on this

case that have not yet been billed. I wrote Mr. Chambers a letter concerning the status of the receivership immediately after his appointment and he attended a meeting at my office on my invitation to impress upon him the need to provide for settlement with the preferential creditors including the tax authorities.

65. Had the delays in concluding the management phase of the receivership occasioned by SAC not occurred, the receivership could have been concluded years before, and interest on the overdrafts and receiver's fees including those related to Mr. Creary would not have reached the levels they did.

66. Furthermore had Recon and FINSAC in conjunction with NIBJ not interfered time and again with my efforts to dispose of the business, I believe that the quality of the bids and the number of bidders would have been greater.

67. All cheques written on the bank accounts were for legitimate business reasons. The balance in the BNS account fluctuated and the extent of interest applicable to the potentially offsetting portion of the overdraft would have been far less than interest on the entire overdraft. Had the banking facilities required for continued operations been granted there would still have been considerable interest expense, unless the

debenture holder provided the funds on an interest free basis to clear the NCB overdraft.

68. In any event, I believe that for much of the time the,owner of the debenture and the owner of the overdraft (whether NCB, FINSAC or Joslin or their subsidiaries) were concurrent and therefore any depletion of the funds available to any of the debenture holders as a result in Brent on the overdraft were income to the same party and no net loss resulted in such period.

69. This ownership of both the debenture and the overdraft might have gained, for the debenture holder, a priority in the distribution of the proceeds of the sale of the business, even over the preferential creditors, that they did not have before, in respect of the interest on the overdraft. This is because the very first charge on a receivership is the receiver's costs of which the overdraft including accrued interest, which the debenture holder owned, was a part. Depending on the quantum of the preferential debt, which I expect has by now been determined by the present Receiver, this upgraded ranking for the debenture hoider could have further mitigated any costs applicable to what was originally the NCB overdraft.

70, The quantum of the final distribution in setting the price Joslin paid FINSAC for the debenture need not represent a loss to him or his organization. This is because the debenture can, as I understand it, be "put" back to FINSAC at his cost at his option Furthermore, Joslin should have done due diligence before his purchase of the debenture that should have included discussions with me, which he did not request and which therefore did not take place, before deciding on the

pri to e °laid° to a=cquire=the==dVo ittrrre `from El-NS-AL or its subsidiary,

71. All banking arrangements were made in good faith for the purpose of protecting and preserving the undertaking, properties and assets of the companies. Had the operations been discontinued in the alternative of continuing business with the BNS bank account, there would have been no balances in the BNS account at all but the remainder of the overdraft would still have been outstanding and accruing interest and the proceeds of the sale of the assets would have been less than the proceeds realized from sale of the undertaking as an operating business with market share and staff intact.

72. Any amounts paid to Price Waterhouse or PricewaterhouseCoopers from the funds of the receivership were to pay Receiver's fees pursuant to the appointment of the Receiver and Manager by the

debenture ho{der in accordance with custom and practice in Jamaica. No other payment was made for the benefit of the firm, its partners or myself whatsoever

DATED THE 21ST DAY *OF* JANUARY, *2005*

FILED BY MYERS, FLETCHER & GORDON, Attorneys-at-Law of 21 East Street, Attorneys-at-Law for the Defendants.

PERSONAL NOTES:

Name: [redacted]
Profession: Chartered Accountant

Positions held:

Partner PricewaterhouseCoopers, Jamaica (1973 to present)

[redacted]

Award: [redacted]

CURRICULUM VITAE 40 [redacted]

Nationality: Jamaican

CURRICULUM VITAE 41 [redacted] Marit

al Status: [redacted]

Language: English

EDUCATION:

To 1962 [redacted]

PROFESSIONAL CERTIFICATION:

Member of Canadian Institute of Chartered Accountants (Quebec 1967 - 1996, resigned on joining Nova Scotia) and Nova Scotia 1995 to date.

1967

Fellow of Institute of Chartered Accountants of Jamaica,

1973

PROFESSIONAL HISTORY:

[redacted]

Corporate Finance/Recovery/Privatisation Projects

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

CURRICULUM VITAE a

[redacted]

[redacted]

I BELIEVE THAT THE FACTS STATED IN THIS WXTNESSS STATEMENT ARE TRUE TO THE BEST OF MY KNOWLEDGE, INFORMATION & BELIEF.

DATED THE 18th DAY OF January 2005

[redacted]