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THE CALEDONIAN DECISION

Impact on Bank Accounts in the Cayman Islands

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Depositors with more than CI$20,000 (US$24,000) in an "A" licensed bank in the Cayman Islands may be surprised to know that upon the insolvency of the bank they will be treated differently than those depositors who hold CI$20,000 or less.

After the insolvency of the bank, depositors with more than CI$20,000 will receive amounts due to them only after the payment of secured creditors, expenses and preferential debts.

This issue was brought to the forefront in the case of *In The Matter Of Caledonian Bank Limited (in official liquidation) Grand Court of the Cayman Islands Financial Services Division, July 23 2015, FSD 27 of 2015 (ASCJ)* ("Caledonian Case") where Chief Justice Smellie had to consider the interpretation of section 141 and Schedule 2: section 1 of category 2 of the Companies Law (2013 Revision) ("Companies Law"). The Chief Justice found that depositors with less than CI$20,000 held preferential debts under the Companies Law and should be treated in priority to those that had more than CI$20,000.

The conclusions in that case highlight a significant departure from the original formulation of the Companies Law, which protected the first CI$20,000 of all depositors' deposits made with a bank. In 2007, the law was amended to its current form, which provides that any sum due to eligible depositors "*which does not exceed the deposit limit*" shall be a preferential debt. The deposit limit is expressed to be CI$20,000.

The material question before the Chief Justice was the meaning of the words "*and which does not exceed the deposit limit*". Prior to the 2007 amendment to the Companies Law, the Report of the Law Reform Commission (Review of the Corporate Insolvency Law and Recommendations for the Amendment of Part V of the Companies law) of April 2006 (the "2006 Report") proposed amendments to the Companies Law in order to clarify the existing law. Counsel for the Joint Official Liquidators in the *Caledonian* case argued on the basis of the 2006 Report, that it was evident that Parliament's intention was only to clarify the existing law, which provided a blanket protection for the first $20,000 of all bank deposits.

The Chief Justice found it difficult to accept the liquidators' argument as it would deny the plain meaning of the words. The very different language used in the 2007 amendment pointed to the legislative intent to change the law to protect small depositors who are due no more than CI$20,000 rather than give all depositors preferential payment up to CI$20,000. The effect is that depositors with $20,000 or less will be treated as preferential creditors and paid in priority to those with deposits in excess of $20,000. After the insolvency of the bank, depositors with more than CI$20,000 will receive amounts due to them only after the payment of secured creditors, expenses and preferential debts. Distributions shall be made on a pari passu basis with other

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unsecured creditors of the bank.

The Chief Justice's findings signify a clear departure both from the pre-2007 Companies Law position and from the European Commission guarantee deposit scheme. However, the result may be justified on the basis that there is a need to protect small stakeholders who are the most vulnerable in the wake of an insolvency and for whom the effect of a bank insolvency could otherwise prove devastating.

We can only wait to see if Parliament has any reaction to the judgement in the Caledonian case and whether it truly reflects Parliament's intent.

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