1988?

IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN
BEFORE THE HON. CHIEF JUSTICE SIR JOHN SUMMERFIELD C.B.E., Q.C.,

IN THE MATTER OF S (A COMPANY)

IN THE MATTER OF T (A COMPANY)

AND IN THE MATTER OF THE COMPANIES LAW

Mr. Andrew Jones for applicants

Mr. Norman Hill Q.C. (with him Mr. Roger) for respondents

Mr. Ground for the Attorney General as amicus curiae.

REASONS FOR DECISION

This is an application by persons holding themselves out as petitioning creditors, in petitions for the winding up of two companies, for the hearing of the petitions to be held in camera or, pursuant to section 94 of the Companies Law, in Chambers. One of the main distinctions between a hearing in camera and a hearing in chambers lies in the proceedings which might follow as a result of unauthorised publication of a report of the evidence adduced in the course of the hearing. It is said that that would constitute an offence under section 99 (1) (e) of the Penal Code where the hearing is in camera but contempt of court where the hearing is in chambers.

Normally, some statutory provision permits a certain cause or matter to be heard in chambers. In the case of a trial, however, the power of a judge to order that the whole or any part of it shall be heard in camera is very limited. It is clear from Scott (otherwise Morgan) and Anor v Scott 1913 AC 417 that exceptional circumstances must be demonstrated before the whole or any part of a trial can be ordered to be held in camera.

While the category of cases in which such an order can be made is not closed that case stresses that a paramount consideration is whether justice can be done. If not, the general rule as to publicity must yield. Where it is shown that the administration of justice would be rendered impracticable by the presence of the public, as for example where a party would be reasonably deterred by publicity from seeking relief at the hands of the Court, an order may be made. It is not sufficient that the parties themselves agree that the hearing shall be held in camera.

In my view, where a statutory provision gives a court power to hold proceedings in chambers then the conditions for its exercise are not so stringent. For example a judge may consider that its exercise is proper where the parties agree that the matter shall be heard in chambers. The legislation gives the judge a discretion to decide whether the hearing is to be in public or not. Of course, in reaching his decision the judge must balance competing claims and the arguments in favour of either course as presented to him. The usual principles will apply to the exercise of his discretion.

Heretofore, (certainly during the last 8½ years or so) it has been the invariable practice to hear petitions for winding-up in open court. Not that they attract any public interest as I cannot recall one hearing which received coverage in the press. Be that as it may, it appeared to be acceptable in principle (perhaps largely as a matter of habit which was never challenged) that these petitions should be held in open court and the decision announced publicly. This follows the English practice. No difficulty over exposure of confidential information appeared to present itself.

It was because of this, the nature of the business of the two companies, their clientele and the nature of the evidence upon which the petitions were based that I invited the Attorney General to appear as amicus curiae to assist on a matter of some public importance. I am indebted to Mr. Ground for his assistance.

In the result an order was made in the following terms:

> "In exercise of the power conferred by section 94 of the Companies Law I order that the hearing of the petitions be

> "held in Chambers. The resultant orders together with any consequential relief will, however, be announced in open court.
>
> Reasons for this decision will be given and, for the benefit of the public, will be announced in open court so that the public will be aware of them.
>
> Respondent to pay costs.".

These are those reasons.

Section 94 of the Companies Law (which appears in Part V headed "Winding up of Companies and Associations under this Law") provides:

> "A Judge may do in chambers any act which the Court is hereby authorised to do.".

That would cover the hearing of a petition in chambers. As observed earlier the court has a discretion in the matter.

A number of facts are in dispute. One cannot resolve these issues on conflicting affidavits and, in any event, this is not the proper stage for the trial of those issues. What follows is based on the allegations of the peititioners. The decisions on the petitions will, of course, turn on how the disputes on the facts are resolved.

The two companies are part of a group of companies controlled directly or indirectly by a local resident. Some of the companies in the group have their shares owned in the names of other companies in the group but those companies are beneficially owned by clients who for the most part are residents of North America. The directors of those companies are companies within the group, controlled directly or indirectly by the local resident, or the local resident himself or an employee.

S is the management company in which the majority of investments by clients were initially placed and which managed client and in-house companies.

T is an investment company which accepted client companies' funds for investment in several programmes covering different types of securities.

Both companies were engaged in the business of marketing what have been referred to as tax avoidance schemes.

To digress for a moment, the distinction between tax avoidance and tax evasion is well known. The latter involves a breach of the tax laws of the country to which a person is liable to tax. The former involves the arrangement of one's financial affairs in a manner which legitimately attracts the minimum amount of tax or none. In Britain the tendency is to refer such schemes as tax efficient ones which is a more appropriate description as no law is infringed.

However, whatever the arrangement may be it is clearly the policy of this Government not to assist the taxing authority of another country with the enforcement of its revenue laws. That is a policy in keeping with that of many other respectable countries.

To digress further, it does not follow that, because a person wishes to enshroud his financial affairs in a veil of confidentiality, he is doing or has done anything wrong. There are a host of good ~~reasons~~ why a person may legitimately wish his financial affairs to be kept confidential. And the mere fact that the person wishes, in particular, to keep certain transactions from the prying eyes of his taxing authori does not necessarily mean that he has infringed any tax or other law applicable to him. It is a matter of notoriety that some tax authorities, when they discover money invested in a tax haven, can make life less than comfortable for the person in whose name that money is even though he has done nothing wrong. That is one reason why scrutiny by the tax authorities is better avoided. One has in mind, for example, the notorious device of blind assessments that a suspiscious tax authority can levy, requiring the wretched victim to meet the cost and face the inconvenience of a protracted and time consuming battle to prove that he is not liable to the tax so levied and has contravened no law. That is the sort of attention that most law abiding citizens can well do without. And that is why a number of respectable countries entrench the necessity for confidentiality in handling the financial affairs of individuals in their laws. One should not assume that because a person wishes to avoid the attentions of the tax authorities that he is doing something shady. Such a view implies that all the respectable institutions in these Islands and elsewhere that handle the financial affairs of non residents on a confidential basis are in a giant conspiracy to cheat the fiscal authorities of the countries in which those persons reside. That is an untenable view.

That digression leads up to this. An essential feature of the marketing of tax efficient schemes, and other investments, is the stress placed on the complete confidentiality with which the financial affai will be handled. The Confidential Relationships (Preservation) Law underpins that feature. It is a key factor in attracting business to these Islands. And that business contributes substantially to the economy of these Islands.

It is wrong in principle and, in my view, must be against public policy that a customer who has been attracted to do business in these Islands with an institution offering financial services on the basis of strict confidentiality should be impeded in the enforcement or protection of his rights in relation to assets here by reason of the impairment of the principle of confidentiality despite a provision of law (section 94) which would allow confidentiality to be preserved.

It is apparent from an affidavit filed in this matter that the petitioners in these cases do not wish to give evidence in public in case their evidence comes to the attention of the Internal Revenue Service. One can envisage that other creditors entitled to appear at the hearing may well be deterred from exercising their right to support or oppose the petitionsfor the same reason. This in itself would impede the paramount duty of the Court to secure that justice is done and falls within the principles canvassed in Scott v Scott and which were echoed in R v Chief Registrar of Friendly Societies, ex parte New Cross Building Society 1984 2 All E.R. 27.

There is also merit in the submission that it would be inconsistent with the public interest, as reflected by the provisions of the Confidential Relationships (Preservation) Law, to allow a winding-up proceeding to be heard in public in a case in which the company which is the subject of the proceeding is involved in the business of providing financial and management services to offshore clients with the promise of confidentiality. I would not wish, and it is not necessary for the purposes of these cases, to make such a sweeping generalisation. But the nature of the business conducted may well be an influencing factor in most such cases. Each case should be considered in the light of the circumstances as a whole. However, a factor deserving some weight is this: where companies such as these have solicited investments from persons known to be vulnerable in their own country, is it right that their vulnerability should be exploited to deter proceedings? I am dealing here with general principles.

It would be wrong, and bad for the image of these Islands as a tax haven, for persons who provide financial and management services here to take comfort from the prospect that any malpractise on their part may be safe from disclosure because of the disinclination of clients to enforce rights for fear of public exposure of their financial transactions. That would quickly lead to an unhealthy state of affairs.

It is clear that in these contested cases a great deal of confidential information (not only pertaining to the petitioners but to other clients) is at risk of disclosure. The risk does not have to be one of a deliberate or malicious intention. One knows from experience how lapses of this kind can occur with the best of intentions. One deponent on behalf of the respondents has already fallen into the trap of disclosing confidential information relating to the affairs of another without clearance under section 3A of the Confidential Relationships (Preservation) Law. This risk in itself appears to me to merit the exercise of the discretion given by section 94.

In the arguments for the companies stress has been laid on general principles as expounded in Scott v Scott and R v Chief Registrar and I have been urged not to hear the petitions in camera unless the criteria laid down in those cases have been fairly met and then only in relation to such parts of the hearing as it may be necessary in the light of those criteria. As it is I am satisfied that the principles in those cases do apply here and that they apply so generally that it would be impossible to try to chop up the hearing into segments.

But in any event, I have expressed the view that in exercising the power under section 94 the court has a much wider discretion and is in no way fettered by the principles set out in Scott v Scott and R v Chief Registrar.

I recognise that the decision here is made easier by the discretion given by section 94. It must be realised that in other types of proceedings the position will be different. Where, for example, a client sues a company similar to either of these for the return of his deposit then the protection which can be given under the Companies Law will not apply. At most, some protection can be given if there is a case for the principles in Scott v Scott to apply. Some protection may be possible by the operation of the Confidential Relationships (Preservation) Law. However, those questions must be left until they arise in a case. Here I am concerned only with the hearing of petitions for the winding up of the two companies. And, in relation to those petitions, section 94 can be invoked.

It was further urged that, in any event, these applications are premature; that no decision on them should be taken until other crucial issues have been determined, including the question of whether the petitions have any right to petition for a winding up as creditors of the two companies. It was also contended that the hearing of these summonses should be deferred until other creditors have entered the arena and can be heard on the matter.

In my view, the important elements, at this stage, are the petitions. These summonses are aimed at a decision on whether those petitions are to be heard in private or in public. The petitions are there on the file and unless some process disposes of them in some other way they will have to be heard. The decision on whether they will be heard in private or in public will almost certainly affect what, if any, creditors will appear to oppose or support the petitions. Those creditors do not have any standing at this stage. Their right to appear comes into being when the hearings on the petitions commence. At that stage it may be too late to repair the deterrent effect that the prospect of a public hearing may have. The indications are that the present petitioners themselves are reluctant to give evidence in public.

The question of whether the petitioners have a right to petition for the winding up of the companies can and should be agitated at the hearing of the petitions together with any other questions affecting the merits or demerits of the petitions. On the hearing of the petitions all matters relating to the ultimate decision as to whether one or both should be dismissed or whether a winding-up order should be made in relation to one or both companies can and should be canvassed. It is the decision on the petition that matters in the end. There is no case for a series of assaults on the petitions (which incidentally are attacks by way of summons which would themselves be heard in chambers) with a view to knocking out some prop. Those summonses merely pre-empt issues which should be heard together with others when the petitions come on for hearing. Until the hearing of the petitions any summons must be confined to setting the stage for the hearing, e.g. giving directions as to how and when each shall be heard etc.. The petitions cannot be knocked out of court by these interlocutory processes. It is only upon the hearing of the petition that it can be dismissed - section 97. The position is very different from that in Stonegate Securities Ltd. v Gregory 1980 1 Ch 576. Apart from anything else process in that case was issued before the presentation of the petition.

Learned counsel for the companies has very properly not sought to suggest that the companies would suffer any prejudice by an order that the petitions should be heard in private. It is difficult to see how they could possibly be prejudiced in any way thereby. Reliance has been placed solely on principle.

In the end, while I do not accept that the test alluded to in

Scott v Scott is the only or the main test for deciding whether section 94 should be invoked, I am nevertheless satisfied that that test has been met. A public hearing would effectively deprive creditors of relief they might be entitled to. Even had that test not been met I would have made the order under section 94 for the reasons I have given. The resultant orders will, however, be announced in open court.

I have taken pains in drafting these reasons, which will be made public, to conceal the identity of the parties and other interested persons. Except on the copy of these reasons filed in the court files (which will be kept confidential) nothing is to appear in the heading or elsewhere which might lead to the disclosure of the parties or any confidential information.

Sir John Summerfield.