31.1.85

IN THE GRAND COURT OF THE CAYMAN ISLANDS

HOLDEN AT GEORGE TOWN

CAUSE NO. OF

IN RE D (IN LIQUIDATION)

AND

IN RE THE COMPANIES LAW.

J U D G M E N T

This is an application by the joint liquidators of a company in winding up for an order that a letter of request for international judicial assistance issue to the proper judicial authority in Switzerland for the examination of two witnesses in Switzerland and for the production by them of documents prepared by auditors in Switzerland. In effect it is sought to invoke O 39 rr 1 and 2 of the Rules of the Supreme Court of England and Wales (said to apply by virtue of section 20 of the Grand Court Law and rule 62 (63?) of the Grand Court (Civil Procedure Rules) (as contained in the Grand Court (Civil Procedure) (Amendment) Rules 1980)) in conjunction with sections 124 and 125 of the Companies Law.

The order is sought because an order under section 124 of the Companies Law directed to a member of the Cayman counterpart of the same Swiss auditors met with no success because the audit of the company had been undertaken by the Swiss branch of the same firm of auditors and that branch had all the relevant documents. The Swiss branch declined a request to pass those documents to the Cayman branch. In Switzerland, of course, the documents sought would be protected by the Swiss secrecy laws.

The question for determination is whether this Court has the power and jurisdiction to make the order sought and, if so, whether in the exercise of its discretion, it should do so.

As the matter appeared to be one of considerable public importance and no precedent could be found here or elsewhere the Attorney General was invited, with the consent of the parties, to appear as amicus curiae. Mr. Ground represented the Attorney General. As it happened, a substantially similar application was made shortly after this one was filed. Mr. Jones had conduct of that second application and, with the consent of all the parties, he was invited to appear at the hearing and to make representations on the principles and law applicable.

The upshot was that all parties supported the application. It is, therefore, with considerable hesitation that I have found myself unable to make the order sought. I am, however, extremely grateful for the assistance given.

Let me say at once that I have no quarrel with the policy considerations advanced. In my view the policy of the Legislature behind section 124 of the Companies Law and section 268 of the English Companies Act 1948 is the same, namely, to arm the court with adequate powers to extract information (from persons who have it) relating to the affairs, assets and dealings of the company in liquidation and the conduct of its directors and other officers so as to enable the liquidator/s to effect an orderly, equitable and effective winding up of the company by, amongst other things, tracing and collecting assets and bringing actions against malfeasants and debtors. One recognises that in the Cayman Islands considerable advantages ensue if the court can reach out to other jurisdictions to exercise the powers under section 124 of the Companies Law, particularly in the case of an exempted company whose affairs are being conducted, and whose assets are held, in another jurisdiction.

The company is being wound up under the supervision of the court and sections 124 and 125 of the Companies Law apply by virtue of section 151.

Those sections read as follows:

> "124. (1) The Court may, after it has made an order for winding up the company, summon before it any officer of the company or person known or suspected to have in his possession any of the estate or effects of the company, or supposed to be indebted to the company, or any person whom the Court may think capable of giving information concerning the trade, dealings, estate or effects of the company; and the Court may require any such officer or person to produce any books. papers, deeds, writings or other documents in his custody or power relating to the company.
>
> (2) If any person so summoned, after being tendered a reasonable sum for his expenses, refuses to come before the Court at the time appointed, not having a lawful impediment (made known to the Court at the time of its sitting, and allowed by it), the Court may cause such person to be apprehended and brought before the Court for examination; nevertheless, where any person claims any lien on papers, deeds, writings or documents produced by him, such production shall be without prejudice to such lien, and the Court shall have jurisdiction in the winding up to determine all questions relating to such lien.
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> 125. The Court may examine upon oath, either orally or upon written interrogatories, any person appearing or brought before it in manner aforesaid concerning the affairs, dealings, estate or effects of the company, and may reduce into writing the answers of every such person, and require him to subscribe the same.".

The first thing to note is that, in exercising those powers, the Court is not trying any issue. There is no justiciable issue before the court. The court is not sitting to reach a decision on any question. It is purely fact finding for the purpose of a proper winding up. It is a process of interrogation and nothing else - In Re Norwich Equitable Fire Insurance Company 1884 XXVII Ch 515.

The second thing to note is that it is a power vested in this court exclusively. While in practice the liquidator or his counsel would put the questions (because the liquidator knows best what information he requires) it nevertheless remains an interrogation by the court itself. There is no power to delegate the power to an independent examiner in these Islands (except, possibly, to a court official such as the Registrar by analogy with the practice in England). A fortiori it could not delegate the power to an independent examiner abroad so as to enable that independent examiner to compel the appearance of a witness and compel that witness to answer questions pursuant to sections 124 and 125.

I accept that there is an inherent power and jurisdiction in this court to seek the assistance of a foreign court. As far as I can determine that power and jurisdiction is confined to seeking the assistance of a foreign court in obtaining evidence for the purpose of a justiciable matter before the court and other tribunals trying a justiciable issue.
This is recognised by the Hague Convention.
The resultant information following an interrogation pursuant to sections 124 and 125 is not for the benefit of this court or any other tribunal in relation to the trial of justiciable issues or otherwise. It is for the benefit of the liquidator to enable him better to carry out his administrative functions in the winding up.

I accept that this application is "a matter" for the purpose of O 39 r 1 - In Re Mysore West Gold Mining Company 1889 XLII Ch 535. Likewise the answers to the interrogation can be loosely termed "evidence" for the purpose of O 39 r 2 - judgment of Woolf J in an unreported case I can only identify as Re International Power Industries Inc., Case No. 7, in the Queen's Bench Division dated 18th July 1984 (and which I will refer to as case No. 7).

However, the short answer to any attempt to invoke the provisions of O 39 is that it does not apply to proceedings of this kind. O 1 r 2 makes it clear that none of the Rules of the Supreme Court apply to proceedings relating to the winding up of companies. It follows that O 70 would not apply to the reverse process in a matter relating to the winding up of companies - an aspect not adverted to in case No. 7.

Section 20 (2) of the Grand Court Law provides that "in any matter of practice or procedure for which no provision is made by this or any other Law or by any Rules, the practice and procedure <u>in similar matters</u> in the High Court in England shall apply so far as local circumstances permit and subject to any directions the Court may give in any particular case". That rules out the application of O 39 in proceedings here relating to the winding up of companies because it does not apply to a "similar matter" in England. The power of the Court to give directions in any particular case is a power to modify the English procedure which would apply and not a power to invent an altogether new process unrelated to the practice and procedure in England. Even if the power extended to the invention of a new process I would not exercise it for the second reason I will advance for refusing this application.

Therefore, not only does the inherent power and jurisdiction I have adverted not apply to this non-justiciable matter but no process exists for its exercise had it existed.

I can now turn to the second reason and that is if there were power and jurisdiction to make the order sought I would not, in the exercise of my discretion, make it because this Court could not reciprocate in the event of a similar request coming to this Court from a foreign Court - Case No. 7.

I accept the point made that this Court must distinguish between the procedure for issuing a request and that for giving effect to a request from a foreign court. I bear this in mind, but if the end result in relation to a request from a foreign court, following the procedure for processing such a request, is that the request is refused this Court should not ask of a foreign Court that which this Court would refuse to that foreign Court. And it becomes immaterial what the procedure is for issuing the request or for considering the foreign request. It is the principle that matters: do not ask for that which you are not prepared to give.

Case No. 7 was essentially this same application in reverse. A Bankruptcy Court in the United States of America asked the English Court for substantially the same assistance in relation to the relevant U.S.Bankruptcy Law Chapter Eleven as this Court is being asked to request. The relevant provision of Chapter Eleven was in substantially the same terms as section 268 of the English Companies Act which corresponds with section 124 of the Companies Law. The request was refused.

The judgment of Woolf J in Case No.7 was criticised and I have been invited not to accept it as sound law. However having examined it carefully I am satisfied that the judgment is soundly based and that it should be followed in an application in this Court to give effect to a request of a like nature from a foreign Court.

In case No.7 Woolf J was well aware of the provisions of section 268 of the Companies Act and of the fact that that section provided a process in terms of that sought. The kernel of that decision is contained in the following paragraph on 10:

> "If, where there is to be a trial, it is not approprtiate to use the Evidence (Proceedings in Other Jurisdictions) Act 1975 for the purposes of pre-trial discovery, does it become any more appropriate to use that Act when the whole exercise upon which the foreign court is engaged is an exercise in discovery which may result in subsequent proceedings but where no proceedings which will result in a trial are then even contemplated? Having regard to the approach which was adopted by the House of Lords in the Rio Tinto Zinc Corporation v Westinghouse Flectric Corporation (1978) AC 547, (1978) 1 All ER 434, I am bound to answer that question in the negative. It seems to me that the whole object of the Evidence (Proceedings in Other Jurisdictions) Act 1975 and indeed of the Hague Convention, to which it gives effect, is to assist in the determination of actions of a civil nature between one body and another. It is not designed as fact-finding machinery for the purpose of investigating companies whose affairs are being investigated in the way that the IPI company is being investigated by the Bankruptcy Court. It follows, therefore, in my view that these letters rogatory are ones which should not be given effect to, because the nature of the exercise which is now being conducted by the American court is outside the provisions covered by the Act.".

It will be seen that case No. 7 is authority for some of the points made earlier in this judgment.

The position in this country in relation to a request from a foreign court processed under the Evidence (Proceedings in other Jurisdictions) (Cayman Islands) Order 1978 must be the same as that considered in Case No. 7.

As this court would not give effect to a request from a foreign court of the nature now sought it should make that request of a foreign court.

In the light of the foregoing it becomes unnecessary to examine the other arguments advanced except one.

It was urged that what was sought in this application would be available under the Bankruptcy Law - in particular section 151 read with rule 23 of the Grand Court (Bankruptcy) Rules. Two points can be made. In my view this process would not be so available for the same reasons given in relation to sections 124 and 125 of the Companies Law. Secondly, in my view rule 23 could not enlarge the scope of section 151 of the Bankruptcy Law which is in substantially the same terms as section 124 of the Companies Law. It is noteworthy that under the United Kingdom Bankruptcy Act 1914 (sections 121 and 122) a measure of reciprocity is provided as between British courts. Those provisions do not extend to foreign courts. We have no corresponding provision in the Cayman Islands.

Accordingly the application is dismissed.

As this judgment may be of general interest it will be delivered in open court. To that end I have excluded any material of a confidential nature. As further protection it is hereby ordered that the judgment heading will be in the following terms:

In Re D (In Liquidation)

And in Re the Companies Law.

As a postscript I might add that in view of the many advantages in having the power to make the order sought consideration should be given to the introduction of enabling legislation.

SIR JOHN SUMMERFIELD

31 January 1985.