IN THE SUPREME COURT OF BERMUDA
COMMERCIAL COURT
2009: No. 190

IN THE MATTER OF THE LIQUIDATION OF FOUNDING PARTNERS GLOBAL FUND LTD

AND IN THE MATTER OF A LETTER OF REQUEST OF THE GRAND COURT OF CAYMAN DATED 16 JUNE 2009

REASONS FOR DECISION

Date of Decision: June 29, 2009
Date of Reasons: July 29, 2009

Mr. Mark Diel, Marshall Diel & Myers, for the Caymanian Joint Provisional Liquidators

Introductory

1. On June 29, 2009, pursuant to a Letter of Request from the Cayman Grand Court dated June 11, 2009, I granted an Ex Parte Order in respect of the Caymanian-incorporated company named Founding Partners Global Fund Ltd. ("the Company") in the following terms:

> "*1. That the appointment of David Walker and Ian Stokoe as provisional Liquidators of the Company is hereby recognized by this Court.*
>
> *2.That the provisional Liquidators shall have such powers as would be available to them under the Companies Act 1981 as if they had been appointed liquidators under a compulsory liquidation pursuant to section 170 of that Act and in particular but without prejudice to the generality of the foregoing:*
>
> *(i) To locate, protect, secure and to take into their possession and control all assets and property within the jurisdiction of the Supreme Court to which the Company are or appear to be entitled;*

(ii) To locate, protect, secure and to take into their possession and control the books, papers and records of the Company including the accounting and statutory records within the jurisdiction of the Supreme Court;

(iii) To retain and employ barristers, solicitors or attorneys and/or such other agents or professional persons as the Provisional Liquidators consider appropriate for the purpose of advising or assisting in the execution of their powers.

3. That anything that is authorized or required to be done by the Joint Provisional Liquidators may be done by all or any one of the persons appointed.

4. That for so long as the company remains in liquidation in the Cayman Islands, no action or proceeding shall be proceeded with or commenced against the Company or its property within the jurisdiction of the Supreme Court except with the leave of the Supreme Court and subject to such terms as the Supreme Court may impose."

2. The Bermudian court has cooperated extensively with foreign insolvency courts in relation to parallel proceedings involving Bermudian companies over the last two decades. It is quite rare to receive requests for assistance from foreign insolvency courts for recognition of a foreign insolvency order in relation to companies not incorporated in Bermuda. In the absence of a Bermudian statutory framework delineating the circumstances in which judicial cooperation with foreign insolvency courts will take place, there is a need for clarity as to the content and scope of the applicable common law rules.

3. As this was possibly the first occasion upon which this Court had exercised its common law discretionary powers to cooperate with foreign insolvency courts by recognising and assisting the foreign proceeding without commencing ancillary liquidation proceedings here, I indicated that I would give reasons for so deciding.

The Letter of Request

4. The Caymanian Joint Provisional Liquidators ("the JPLs") were appointed by the Caymanian Grand Court (Foster J) on June 11, 2009. On the same date the Cayman Court issued a Letter of Request which exhibited a copy of the JPLs' appointment order and requested an order substantially in terms of the Order made by this Court herein on June 29, 2009. The recitals to the Letter of Request described (a) the status of the Grand Court as "*a court exercising jurisdiction in relation to company and insolvency law in the Cayman Islands*", (b) the Company as having been incorporated in the Cayman Islands, (c) the presentation of a winding-up petition against the company on June 12, 2009, (d) the appointment of the JPLs, and further asserted that (e) "[t]*he evidence filed in the proceedings has*

demonstrated to the satisfaction of this Court that in order for the provisional liquidators to discharge their obligations and in order to get in and preserve the assets of the Company for the benefit of creditors it is just and convenient that this request should issue."

5. In addition to requesting specific assistance by way of recognition of the status of the JPLs, empowering them to get in and preserve any Bermudian assets and ordering a stay of proceedings against the Company, the Caymanian Court also requested that:

> "*The Supreme Court grant such further or other relief as it thinks fit in aid of the provisional liquidators and the provisional liquidation.*"

The Submissions of Counsel

6. Mr. Diel supported his application by reference to the following authorities. Firstly he referred to the Isle of Man High Court decision in *Re Impex Services Worldwide Ltd.* [2004] BPIR 564. In this case, Deemster Doyle fulsomely articulated the reasons why the Manx Court could and should exercise its common law powers to assist the English High Court in relation to English insolvency proceedings relating to an English company. The assistance furnished took the form of recognising the foreign liquidator and permitting him to obtain evidence in the Isle of Man.

7. Secondly, and most importantly, counsel relied upon the leading Judicial Committee of the Privy Council decision on common law cooperation with foreign insolvency courts in *Cambridge Gas Transportation Corp. –v- Official Committee of Unsecured Creditors of Navigator Holdings plc and others* [2007] 1 A.C. 508 . This decision, also an Isle of Man case, established the important principle that the common law jurisdiction to assist a foreign insolvency court empowered the Manx Court to exercise any powers which were available in relation to an equivalent local proceeding; moreover, such assistance could be furnished without the need for ancillary winding-up proceedings to be commenced in the assisting forum. The desirability of exercising common law cooperation powers in furtherance of the policy goal of ensuring that an insolvent company's affairs should be wound-up, as far as possible, under one universal regime was confirmed by the House of Lords in *McGrath-v-Riddell* [2008], to which counsel also referred. This case dealt with the specific issue of whether assets collected in an ancillary proceeding in England should be remitted to the principal liquidation court in Australia.

8. And, lastly, Mr. Diel referred to this Court's own decision in *Re Dickson Holdings Limited* [2008] Bda LR 34; (2008) 73 WIR 102, where the common law discretionary power to recognise a foreign winding-up order and the appointment of foreign liquidators was affirmed, albeit with respect to a Bermudian-incorporated company.

Legal findings

9. The common law discretionary power to recognise foreign winding-up proceedings and foreign liquidators appointed in the company's place of incorporation has been described in Fletcher, '*Insolvency in Private International Law*', 2nd edition (Oxford University Press: Oxford, 2005) pages 2001-202, as follows:

> "*3.91. The case law concerning the recognition in England of foreign liquidations has been strongly influenced by the principles applied in the parallel situation of bankruptcy. However, due to the different structures of bankruptcy and winding-up procedures under our domestic law, English courts have adopted a modified position towards certain important matters. The most significant modification is with regard to the effect of a foreign liquidation upon the company's English assets, as discussed below. In the first place, however, we may note the strong parallel with bankruptcy in the general approach to recognition of foreign insolvency proceedings relating to companies. Just as the country of an individual's domicile has been traditionally regarded by our law as the 'natural' forum for proceedings having a bearing upon that person's civil status and capacity, including bankruptcy proceedings, so in the case of companies much importance is attached to the law of the country of incorporation in determining the essential qualities concerning the company's birth, its life, and also its demise. This philosophical leaning towards the State of incorporation ensures that the English recognition rule looks primarily to the courts of that country to supply the forum for winding up. This approach also reflects the view of English law that the domicile of a corporation is located, possibly immutably, in its country of formation.*
>
> *3.92 It follows therefore that winding-up proceedings that have commenced in the country under whose laws the company was originally incorporated will be recognized in England. This would appear to hold true even in cases where the company's central management and control are shown to be located in some other jurisdiction: the analogy with the statutory precept whereby the English court retains the competence to wind up any company registered in England and Wales is likely to provide a powerful argument for accepting the competence of the foreign court in a like situation, although the point appears never to have arisen in a reported case. An important aspect of the recognition accorded to proceedings conducted under the law of the company's country of incorporation- also constituting the corporate domicile- is that the office holder appointed under those proceedings will be accepted in England as the person with standing to represent the collective interests of creditors and to invoke the assistance of the courts here. The office holder's eligibility to maintain any claim to the company's English assets is subject, however, to there being confirmation that he is clothed with*

the requisite rights and powers over the company's property by the law under which his appointment has originated, and that his powers conferred by that law are intended to be exercisable over property situated beyond the frontiers of that country."

10. This accurately reflects the position under Bermudian common law. The following dictum of Deemster Doyle in the Isle of Man case of *Re Impex Services Worldwide Ltd.* [2004] BPIR 564 may also be said to reflect the position under Bermudian law and practice in cross-border insolvency cases:

> "*[85] ... it is common ground that we do not have any statutory provisions in the Isle of Man which can assist the petitioner in obtaining the relief she seeks. What then is the position at Manx common law? In my judgment Manx common law would be guided and influenced by English common law prior to the implementation of s 426. Manx common law however would not develop in ignorance and without due regard to English statutory developments and cases decided in respect of such statutory developments.*
>
> *[86] In determining the common law of the island it will be of assistance to determine the position in English common law prior to s 426 coming into force.*
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> *[87] Dicey and Morris on the Conflict of Laws (Dicey and Morris) (Sweet & Maxwell, 13th edn, 2001), at para 30-097 refers to judicial assistance and makes the point that a prominent and distinct feature of the private international law of insolvency has been the development of procedures whereby English courts have a discretion to provide assistance in aid of foreign proceedings.*
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> *Dicey and Morris state:*
>
> *'Although [t]here were no statutory procedures in the context of corporate insolvencies until the Insolvency Act 1986, it was clear that the principle of co-operation was recognised at common law. The statutory regime is to be found in the Insolvency Act 1986, section 426, though there is no reason to doubt that the existence of this section does not prejudice the continued operation of the common law.'*
>
> *[88] In support of these propositions Dicey and Morris do not refer to any specific judicial decisions but rely heavily on Fletcher in Fletcher (ed), Cross Border Insolvency: Comparative Dimensions (UK National Committee of Comparative Law, 1990) (Fletcher 1990) and Smart, Cross-Border Insolvency (Butterworths Law, 2nd edn, 1998) (Smart 1998). I note Mr Mann's point that judges should be guided by legal precedent rather than by academic comment. Judges frequently however are guided by*

comments made by leading scholars of the day. One only needs to refer to the House of Lords' decision in R v G and Another [2003] UKHL 50, [2003] 3 WLR 1060 (judgment delivered on 16 October 2003), at para [34] if any legal precedent is required for that judicial comment. In the absence of any specific case-law on the point let us look at those well-respected academic commentaries in more detail.

[89] Fletcher 1990 at p 20 indicates that English case-law embodies a tradition of affording assistance and co-operation to office-holders in overseas insolvency proceedings, to enable them to act in relation to property located in England and Wales. Fletcher states that support for cross-border co-operation in bankruptcy matters was formerly provided by s 122 of the Bankruptcy Act 1914. The modern replacement of that provision, s 426 of the 1986 English Act, 'exhibits numerous improvements upon its pre cursor, not least in respect of its applicability to both corporate and individual insolvency'.

[90] Fletcher 1990, at p21:

'The point is worth making that S 426 contains no provisions inhibiting or abolishing the pre-existing rules and practices of the common law with regard to cross-border co-operation in insolvency matters. S 426 can therefore be seen as providing an additional basis for affording enhanced assistance towards certain jurisdictions with which satisfactory international relationshipsexist.'

[91] Smart 1998, at p 393 indicates that if the foreign liquidation falls within the established bases of recognition at common law:

'the consequences of such recognition may be of great assistance to the foreign representative. For recognition, as a judge once put it, is not a mere acknowledgment of the existence of the foreign insolvency but rather "carries with it the active assistance of the court" (Re African Farms Ltd [1906] 1 Ch 640, per Innes CJ). A view expressly endorsed in a recent decision of the court in New Zealand acting under the common law [Turners & Growers Exporters Ltd v The Ship "Cornelius Verolme" [1997] 2 NZLR 110, at 120].'

[92] In Turners & Growers Exporters Ltd v The Ship 'Cornelius Verolme' [1997] 2 NZLR 110, [2000] BPIR 896, at 120 and 906D respectively, Williams stated:

'Further, before embarking on a discussion of overseas authority, it is to be noted that although the Insolvency Act 1967, s 135 obliges this Court in matters of bankruptcy to act "in aid of and be auxiliary to" any Commonwealth Court exercising similar jurisdiction and provides that

"an order of that Court requesting aid shall be sufficient to enable the High Court to exercise ... jurisdiction" as if the matter had arisen within New Zealand, there is no comparable provision in New Zealand companies'legislation.

The Companies Act 1993, s 342 empowers the making of an order for the liquidation of the New Zealand assets of an overseas company but no such application has been lodged. Common law principles accordingly apply. Indeed, as Smart notes in Cross-Border Insolvency (1991) in reliance on the judgment in Re African Farms Ltd (1906) TS 373, 377 per Innes CJ the recognition of foreign insolvency obliges this Court at common law not merely to acknowledge the same but "carries with it the active assistance of theCourt".'

[93] In that case it was held that the liquidation of a foreign company in its place of incorporation and the appointment of a foreign administrator would be recognised by New Zealand law unless the foreign proceedings were not final, contrary to public policy or breached natural justice, subject always to any positive law in New Zealand. Further, recognition of foreign proceedings carried with it the active assistance of the court.

[94] Smart 1991, at p 394 refers to the Felixstowe Dock and Railway Co v United States Lines Inc; Freightliners Ltd v United States Lines Inc; Europe Container Terminus (BV) v United States Lines Inc [1989] QB 360 where on the facts of the case the English court declined to assist as the US proceedings were discriminatory. Hirst J plainly favoured co-operation with a foreign insolvency process stating:

'I wish however to stress that the court would in principle always wish to co-operate in every proper way with an order like the present one made by a court in a friendly jurisdiction (of which the United States is a most conspicuous example). But whether this is appropriate in any given case, and if so the precise nature and extent of such co-operation, must depend upon the particular sphere of activity in question and the English law applicable thereto ... together with the overall circumstances.' "

11. It is true that these broad statements of principle leave to be answered on a case by case basis the precise parameters of the scope of particular forms of assistance which this Court may provide to a foreign liquidator. However, there seems now to be no doubt that this Court may at least empower a foreign insolvency representative to do all acts in Bermuda (in relation to Bermudian located assets of the company in liquidation abroad) as could be performed by a local liquidator if ancillary proceedings were commenced here. In *Cambridge Gas Transportation Corp. –v- Official Committee of Unsecured Creditors of Navigator Holdings plc and others*[2007] 1A.C. 508 at 518, Lord Hoffman opined as follows:

> "***22*** *What are the limits of the assistance which the court can give? In cases in which there is statutory authority for providing assistance, the statute specifies what the court may do. For example, section 426(5) of the Insolvency Act 1986 provides that a request from a foreign court shall be authority for an English court to apply "the insolvency law which is applicable by either court in relation to comparable matters falling within its jurisdiction". At common law, their Lordships think it is doubtful whether assistance could take the form of applying provisions of the foreign insolvency law which form no part of the domestic system. But the domestic court must at least be able to provide assistance by doing whatever it could have done in the case of a domestic insolvency. The purpose of recognition is to enable the foreign office holder or the creditors to avoid having to start parallel insolvency proceedings and to give them the remedies to which they would have been entitled if the equivalent proceedings had taken place in the domestic forum.*"

12. In *Re Dickson Holdings Limited* [2008] Bda LR 34; (2008) 73 WIR 102 I indicated that this Court might have reservations about recognising the foreign liquidation of a Bermudian company without the commencement of local proceedings if local public policy issues were engaged. Such reservations would not likely arise when the assistance sought relates to a proceeding in the insolvent company's own domicile, as in the instant case. More pertinently, however, an order similar to the specific order sought in the present case was granted by the English High Court in *Re Phoenix Kapitaldienst GmbH* [2008] BPIR 1082, a case which was also referred to in the course of the hearing. In that case, statutory recognition of the foreign proceedings under section 426 of the Insolvency Act 1986 was not available in respect of a German insolvency proceeding. Nor did the EC Council Regulation on Insolvency Proceedings 2000 apply as the company was an investment undertaking. Following the *Cambridge Gas* case, Registrar Jaques made the following order:

> "*(1) the appointment of Frank Schmitt, Attorney-at-Law, Olof-Palme-Strasse 13, D-60439 Frankfurt (the applicant) as Insolvency Administrator of Phoenix Kapitaldienst GmbH by the Local Court Frankfurt (Insolvency Court) pursuant to an order made on 1 July 2005 a copy of which together with the certified translation thereof is appended hereto in the proceedings (the Proceedings) more particularly set out in the schedule hereto be recognised by this Honourable Court;*

(2) without prejudice to the generality of the order made in para (1) the applicant as such administrator be empowered or otherwise entitled to exercise and/or enjoy all such rights, powers, duties and obligations contained in and afforded to Licensed Insolvency Practitioners appointed as officeholders pursuant to or otherwise made in connection with the Insolvency Act 1986 including but not limited to the right to exercise any and all powers available to such officeholders arising under or otherwise available in connection with s 236 of the Insolvency Act 1986, such powers to be exercised in relation to the proceedings."

13. No direct authority was cited for the stay sought by the JPLs which was effectively in terms mirroring the statutory stay which is no doubt in force in Cayman and which would undoubtedly be triggered under section 167 (4) of the were ancillary winding-up proceedings instituted here. However, it seemed clear to me that little practical purpose would be served in recognising the appointment of the JPLs and empowering them to collect and preserve assets if this Court was not also willing to grant a stay of any proceedings here against the Company.

14. There can be no question that if Bermudian liquidators had been appointed, they would empowered to "*bring or defend any action or other legal proceeding in the name of and on behalf of the company*": Companies Act, section 175(1)(a). They would accordingly be able to apply, under section 165 of the Act, to stay any pending proceedings against the Company between the date of the presentation of the petition and the making of a winding-up order. By necessary implication, the liquidators would also likely be able to apply pre-emptively to restrain the institution of proceedings in breach of the statutory stay (by, for instance, purported secured creditors), invoking the general jurisdiction of the Court to grant injunctions to prevent interference with the applicant's legal or equitable rights. Such injunctive relief might more typically be sought, perhaps, with a view to preventing the dissipation of assets rather than the institution of proceedings, but the Court's jurisdiction to grant injunctive relief to protect the interests of the insolvent estate would in such context be fundamentally the same.

15. On this broad jurisdictional basis, the stay sought was granted.

Conclusion

16. For these reasons I decided on June 29, 2009 to make an order (a) recognising the Caymanian proceedings in relation to the Company, (b) recognising the appointment of the JPLs by the Cayman Court, (c) empowering the JPLs to

exercise such powers as a Bermudian liquidator could exercise under the Companies Act 1981, and (d) staying all proceedings against the Company without leave of the Court, on terms that the JPLs proposed to serve all persons intended to be bound by the stay with a copy of the Order.

17. This Order was designed to assist the liquidation of a Caymanian company by its domiciliary court without the necessity for incurring the expense of opening ancillary winding-up proceedings which the JPLs considered were not required.

Dated this 29th day of July, 2009

KAWALEY J